SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 234

MISSISSIPPI PUBLISHING CORPORATION,
Petitioner,

vs.

DENNIS MURPHREE,
Respondent

BRIEF FOR PETITIONER

WILLIAM H. WATKINS,
P. H. EAGER, JR.,
RALPH B. AVERY,
MRS. ELIZABETH HULEN,
Jackson, Mississippi,
Attorneys for Petitioner.

E. C. BREWER,
Clarksdale, Mississippi,
Of Counsel.

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I

Opinions Below

The opinion of the District Judge is not officially reported but is printed in the record on page 33, a copy thereof being made *Appendix "A"* to this brief. The opinion of the United States Circuit Court of Appeals, filed May 7, 1945, is reported "*Dennis Murphree* v. *Mississippi Publishing Corporation*, 5 Cir., 149 Fed. (2d) 138," is printed in the record at page 37, and is made *Appendix "B"* to this brief.

II

Jurisdictional Statement

The jurisdiction of this Honorable Court is invoked under Section 240(a) and subsection 8(a) of the Judicial Code, as

amended, 28 U. S. C. A., Sections 347 and 350, and Supreme Court Rule 38, 5(b).

Grounds of Jurisdiction

1. The Circuit Court of Appeals has decided an important question in a way in conflict with appellate decisions of this settled by this Court.

2. The Circuit Court of Appeals has decided a federal question in a way in conflict with appellate decisions of this Court.

3. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

4. The Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter.

5. The Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions.

III

Statement of Case

This case is before the Court on Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

The respondent, Dennis Murphree, on the 17th day of August, 1944, filed suit against the petitioner in the District Court of the United States for the Western Division of the Northern District of Mississippi, alleging that he was an adult resident of such district; that the respondent was a foreign corporation qualified to do business in Mississippi and was conducting business in all of the counties of the state, including the Northern District thereof; that it had appointed an agent for service of process residing in Jack-

son, in the Southern District of Mississippi. Respondent's complaint alleged that petitioner published certain newspapers in Jackson, Mississippi, in the Southern District thereof, having a wide circulation in the State of Mississippi, and upon the 25th day of July, 1944, published in the columns of such paper defamatory matter concerning him for which judgment was asked. The petitioner filed a motion to dismiss the complaint under Rule 12 of Rules of Civil Procedure, assigning as reasons therefor (1) that the Court was without jurisdiction over the subject matter, (2) that the Court was without jurisdiction over the person of petitioner, (3) that the venue in the case was improperly laid, (4) that insufficient and void process was issued, (5) that the attempted service of process was insufficient. From such motion, supported by affidavits, it appeared that petitioner was a foreign corporation existing under the laws of the State of Delaware; that its principal and only place of business in the State of Mississippi was in Jackson, Hinds County, Mississippi, in the Southern District thereof; that it had never been domesticated under the laws of the State of Mississippi. That it had no office, officer, agent or servant in the Northern District of Mississippi at any time; that if the newspaper complained of published by it circulated in the Northern District of Mississippi, as was admitted, the same was mailed by the petitioner to its regular subscribers therein or sent by public transportation to news dealers in the Northern District of Mississippi who purchased such newspapers and sold the same as independent dealers to their own customers. Such newspapers were composed, published, printed, first circulated and read in the City of Jackson, in the First Judicial District of Hinds County, Mississippi, in the Southern District thereof, wherein respondent's cause of action accrued, if any he had. Process issued from the Office of the Clerk of the United States Dis-

trict Court in the Northern District to the Marshal of the Southern District of Mississippi and was served on petitioner's resident agent in the Southern District of Mississippi.

Petitioner also asserted that respondent was not an inhabitant or resident of the Northern District of Mississippi, but that, on the other hand, he, with his family, moved to Jackson in the Southern District of Mississippi in 1925, acquired a home in which he and his family has continuously resided since such time.

Upon presentation of the motion to dismiss it was conceded that the petitioner had not transacted any business in the Northern District of Mississippi; that such action, if any, as the respondent had against the petitioner accrued in Jackson, in the Southern District of Mississippi and not elsewhere. The District Judge sustained the petitioner's motion to dismiss the action for lack of jurisdiction, holding that the petitioner, a foreign corporation, having transacted no business in the Northern District of Mississippi, could be sued in a civil action, not local, only in the Southern District of Mississippi, and, therefore, the Court had no jurisdiction over the petitioner.

An appeal was taken by respondent to the United States Circuit Court of Appeals for the Fifth Circuit, which Court, upon May 7, 1945, reversed the judgment of the District Court, by opinion reported, *Dennis Murphree* v. *Mississippi Publishing Corporation*, 149 Fed. (2d) 138, is printed in the record at page 37, and is made *Appendix "B"* to this brief.

This Court granted Certiorari.

IV

Errors Relied On for Reversal

The petitioner assigns and relies upon the following errors for reversal of this case:

1. The United States Circuit Court of Appeals committed error in holding that the respondent, even if a resident of the Northern District of Mississippi, could maintain this action against the petitioner, a foreign corporation, only transacting business in the Southern District of Mississippi where its agent for service of process resided.

2. The Circuit Court of Appeals committed error in holding that the District Court of the United States for the Northern District of Mississippi had jurisdiction over the person of the petitioner.

3. The United States Circuit Court of Appeals committed error in holding that Rule 4(f) of Rules of Civil Procedure of the District Courts of the United States conferred personal jurisdiction on the Court over this petitioner.

4. Since the petitioner, a foreign corporation, had not transacted business of any character in the Northern District of Mississippi, the Circuit Court of Appeals committed error in holding that under Rule 4(f), Rules of Civil Procedure of the District Courts of the United States process might issue to the Marshal of the Southern District of Mississippi for service on the petitioner.

5. The Circuit Court of Appeals committed error in holding that Rule 4(f), Rules of Civil Procedure of the District Courts of the United States might be construed and enforced to extend the jurisdiction of the District

Court of the United States for the Northern District of Mississippi.

6. The United States Circuit Court of Appeals committed error in holding that the petitioner, by the appointment of an agent for service of process, consented that it might be sued in the United States District Court for the Northern District of Mississippi although it had never transacted business of any character in such district.

7. The United States Circuit Court of Appeals committed error in holding that the respondent was a resident or citizen of the Northern District of Mississippi.

V

Statutes Involved

(A) This case involves a construction of Paragraph (a), Section 112, U. S. C. A., Title 28 (Judicial Code, Section 51, amended), containing the following language:

> "Except as provided in sections 113-117 of this title, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in sections 113-118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; except that suit by a stockholder on behalf of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been brought by such corporation and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found. Mar. 3, 1911, c. 231, Section 51, 36 Stat. 1101;

Sept. 19, 1922, c. 345, 42 Stat. 849; Mar. 4, 1925, c. 526, Section 1, 43 Stat. 1264; Apr. 16, 1936, c. 230, 49 Stat. 1213."

As well as Section 113, U. S. C. A., Title 28, containing the following language:

"113. (Judicial Code, Section 52). Suits in States Containing More Than One District. When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides."

(B) Rule 4(f), Rules of Civil Procedure, for the District Courts of the United States, contains the following language:

"TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45."

(C) Rule 82, Rules of Civil Procedure, for the District Courts of the United States, is in the following language:

"JURISDICTION AND VENUE UNAFFECTED. These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein."

(D) Section 5319, Mississippi 1942 Code, which is made Appendix C to this Brief.

VI

Summary of Points

POINT I

The United States District Court for the Northern District of Mississippi was without jurisdiction of this case and the District Judge correctly sustained petitioner's motion to dismiss. The Circuit Court of Appeals has decided a Federal question in a way in conflict with applicable decisions of this Court and in conflict with the decisions of other Circuit Courts of Appeal on the same matter.

Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684;

Illinois Central R. Co. v. *Adams*, 180 U. S. 28, 21 S. Ct. 251, 45 L. Ed. 410;

Re Indiana Transp. Co., 244 U. S. 456, 37 S. Ct. 717, 61 L. Ed. 1253;

Erickson v. *United States*, 264 U. S. 246, 44 S. Ct. 310, 68 L. Ed. 661;

United States v. *Arredondo*, 6 Pet. 691, 709, 8 L. Ed. 547;

Lessee of Grignon v. *Astor*, 2 How. 319, 338, 11 L. Ed. 283, 290;

Sections 112 and 113, Title 28, U. S. C. A.;

Ex Parte Shaw, 145 U. S. 444, 36 L. Ed. 768, 771;

Neirbo Co. v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 84 L. Ed. 167;

Stonite Products Co. v. *Melvin Lloyd Co.*, 315 U. S. 561, 86 L. Ed. 1026;

The Galveston, Harrisburg & San Antonio R. Co. v. *Victor Gonzalez*, 151 U. S. 496, 38 L. Ed. 248;

St. L. S. W. R. Co. v. *Alexander*, 227 U. S. 218, 57 L. Ed. 486, 488;

Green v. *C. B. & Q. Ry. Co.*, 205 U. S. 530, 51 L. Ed. 916;
Bank of America v. *Whitney Central Natl. Bank*, 261 U. S. 171, 67 L. Ed. 594, 596;
Peoples Tobacco Co. v. *American Tobacco Co.*, 246 U. S. 79, 62 L. Ed. 587;
Green v. *C. B. & Q. Ry. Co.*, 205 U. S. 530, 51 L. Ed. 916;
Lafayette Ins. Co. v. *French*, 18 How. 404, 15 L. Ed. 451;
St. Clair v. *Cox*, 106 U. S. 350, 27 L. Ed. 222;
Goldey v. *Morning News*, 156 U. S. 518, 39 L. Ed. 517;
Conley v. *Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113;
Geer v. *Mathieson Alkali Works*, 190 U. S. 428, 47 L. Ed. 1122;
Peterson v. *Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 51 L. Ed. 841;
Mechanical Appliance Co. v. *Castleman*, 215 U. S. 437, 54 L. Ed. 272;
Sperry Products, Inc. v. *Association of American Railroads*, 2 Cir., 132 Fed. (2d) 408;
London v. *N. & W. Ry. Co.*, 4 Cir., 111 Fed. (2d) 127;
McCall Co. v. *Bladsworth*, 290 Fed. 365, 2 Cir.;
Sewchulis v. *Lehigh Valley Coal Co.*, 2 Cir., 233 Fed. 422;
Mississippi Code 1942, Section 5319, Appendix "C";
Forman v. *Mississippi Publishers Corporation*, 195 Miss. 90, 14 So. (2d) 344;
Mississippi Code 1942, Section 1433, Appendix "D";
Guaranty Trust Co. v. *Blodgett*, 287 U. S. 509, 77 L. Ed. 463;
Midland Realty Co. v. *Kansas City P. & L. Co.*, 300 U. S. 109, 81 L. Ed. 540;
Schuylkill Trust Co. v. *Pennsylvania*, 302 U. S. 506, 82 L. Ed. 392;
Bacon v. *Martin*, 305 U. S. 380, 83 L. Ed. 233;

Joseph Dixon Crucible Co. v. *Paul*, 5 Cir., 167 Fed. 784;
Turner v. *Board of Trade* (Cert. denied, 245 U. S. 667, 62 L. Ed. 538), 7 Cir., 244 Fed. 108;
Waterman v. *Canal Bank & Tr. Co.*, 5 Cir., 186 Fed. 71 (Cert. Denied, 220 U. S. 621, 55 L. Ed. 613);
Gregg Dyeing Co. v. *Query*, 286 U. S. 472, 76 L. Ed. 1232;
Gatewood v. *State of North Carolina*, 203 U. S. 531, 51 L. Ed. 305;
Green v. *Frazier*, 253 U. S. 233, 64 L. Ed. 878;
St. Mary's Petroleum Co. v. *West Virginia*, 203 U. S. 183, 27 S. Ct. 132, 51 L. Ed. 144;
Neirbo v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 84 L. Ed. 167, 128 A. L. R. 1437;
Oklahoma Packing Co. v. *Oklahoma Gas & Elec. Co.*, 309 U. S. 4, 84 L. Ed. 537;
Ex Parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853;
Baltimore & Ohio R. Co. v. *Harris*, 12 Wall. 65, 20 L. Ed. 354;
Bagdon v. *Philadelphia & R. Coal & I. Co.*, 217 N. Y. 432, 111 N. E. 1075, LRA 1916F, 407 Ann. Cas. 1918A, 389;
Shaw v. *Quincy Mining Co.*, 145 U. S. 444, 36 L. Ed. 768;
Schwarz v. *Artcraft Silk Hosiery Mills*, 2 Cir., 110 F. 2d 465, 467;
Moss v. *Atlantic Coast Line R. Co.*, 2 Cir., 149 Fed. 2d, 701;
Thomas v. *South Butte Mining Co.*, 9 Cir., 230 Fed. 968, 969;
Electric Switch Co. v. *United States Gauge Co.*, 7 Cir., 129 Fed. (2d) 166;
Sewchulis v. *Lehigh Valley Coal Co.*, 2 Cir., 233 Fed. 422;
Sanford v. *Dixie Const. Co.*, 157 Miss. 626, 128 So. 887;

Tri-State Transit Company v. *Mondy*, 194 Miss. 714, 12 So. 2d 920;
Forman v. *Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. 2d 344;
Mississippi Code 1942, Section 5319, Appendix "C";
Lehigh Valley Coal Co. v. *Yensavage*, 2 Cir., 218 Fed. 547;
Sections 109, 110, 112, 113, 114, 116, Title 28, U. S. C. A.;
Seaman Act, 46 U. S. C. A. 688;
15 U. S. C. A., Sec. 22;
49 U. S. C. A. Sec. 321, par. (c).

Point II

The Circuit Court of Appeals committed error in deciding that under Rule 4(f) personal jurisdiction might be obtained over the petitioner in a transitory action filed in the United States District Court for the Northern District of Mississippi, although the petitioner was not present in the District. In this respect the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court. The decision of the Circuit Court of Appeals is contrary to that of other Circuits and if Rule 4(f) of Rules of Civil Procedure was correctly construed by the Circuit Court of Appeals in this case, then such rule violates the Act of Congress of June 19, 1934 authorizing this Court to prescribe such rules as well as the order of this Court of June 3, 1935 appointing an advisory committee for such purpose.

Rule 4(f), Rules of Civil Procedure;
Rule 82, Rules of Civil Procedure;
Contracting Division A. C. Horne Corp. v. *New York Life Ins. Co.*, 2 Cir., 113 Fed. (2d) 864;
Gibbs v. *Emerson Elec. Mfg. Co.* (D. C. Mo.), 29 F. Supp. 810;

Melekov v. *Collins* (D. C. Calif.), 30 Fed. Supp. 159;
Moore's Federal Practice, Supplement to page 361;
O'Brien v. *Richtarsic* (D. C. N. Y.), 2 F. R. D., 42;
United States ex rel. v. *Commanding Officer* (D. C. N. Y.), 3 F. R. D., 360;
United States v. *Skilken*, 53 Fed. Supp. 14;
Herrington v. *Jones*, 2 F. R. D., 108;
Brown Paper Mill Co. v. *Agar Mfg. Corp.*, 1 F. R. D. 579;
Diepen v. *Fernow* (D. C. Mich.), 1 F. R. D. 378;
Adolph Salvatori v. *Miller Music, Inc.*, 35 F. Supp. 845;
Red Top Trucking Corp. v. *Seaboard Freight Lines, Inc.*, 35 F. Supp. 740;
U. S. F. & G. Co. v. *John R. Alley & Co.*, 34 Fed. Supp. 604;
Cashmere Valley Bank v. *Pacific Fruit & Produce Co.*, 33 Fed. Supp. 946;
Barnsdall Refining Corp. v. *Birnamwood Oil Co.*, 32 Fed. Supp. 314;
Gibbs v. *Emerson Elec. Mfg. Co.*, 31 Fed. Supp. 983;
Carby v. *Greco*, 31 Fed. Supp. 251;
Keller v. *American Sales Book Co.*, 16 Fed. Supp. 189;
Melekov v. *Collins*, 30 Fed. Supp. 159;
Richard v. *Franklin County Distilling Co.* (D. C. Ky.), 38 F. Supp. 513, 514;
Toland v. *Sprague*, 12 Pet. 300, 9 L. Ed. 1093;
Munter v. *Weil Corset Co.*, 261 U. S. 276, 43 S. Ct. 347, 67 L. Ed. 652;
Robertson v. *Railroad Labor Board*, 268 U. S. 619, 45 S. Ct. 621, 69 L. Ed. 1119;
Employers Reinsurance Corp. v. *Bryant*, 299 U. S. 374, 67 S. Ct. 273, 277, 81 L. Ed. 289;
Venner v. *Great Northern R. Co.*, 209 U. S. 24, 52 L. Ed. 666;

United States v. *Alaska Packers Assn.* (C. C. A. D. C.), 30 Fed. (2d) 564;
Sibbach v. *Wilson & Co.*, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479;
Richard v. *Franklin County Dist. Co.* (D. C. Ky.), 38 F. Supp. 513;
Sections 112, 113, Title 28, U. S. C. A.;
Rule 82, Rules of Civil Procedure; Rule 4(f);
United States v. *Sherwood*, 312 U. S. 584, 85 L. Ed. 1058, 1063;
Holiday v. *Johnston*, 313 U. S. 342, 85 L. Ed. 1392, 1398;
Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U. S. 359, 47 Sup. Ct. 400, 71 L. Ed. 684;
Robertson v. *Railroad Labor Board*, 45 S. Ct. 621, 268 U. S. 619, 69 L. Ed. 1119;
United States v. *Alaska Packers Assn.* (C. C. A. D. C.), 30 Fed. (2d) 564;
Credit Mobilier Act, March 3, 1873 (45 U. S. C. A. Secs. 81, 88).

SUBSTANTIVE RIGHTS OF A DEFENDANT

United States v. *Sherwood*, 312 U. S. 584, 85 L. Ed. 1058;
Act of Congress, June 19, 1934, Ch. 651;
Order of Supreme Court, June 3, 1935;
Sibbach v. *Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479;
Section 113, U. S. C. A., Title 28;
Neirbo Co. v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 84 L. Ed. 167;
Trolio v. *Nichols*, 133 So. 207, 160 Miss. 611, 617;
Robertson v. *Railroad Labor Board*, 268 U. S. 619, 69 L. Ed. 1119, 1123;
Section 51, Judicial Code, 28 U. S. C. A. Sec. 112;
Employers Reinsurance Co. v. *Bryant*, 299 U. S. 374, 81 L. Ed. 289;

Sewchulis v. *Lehigh Valley Coal Co.*, 2 Cir., 233 Fed. 422;

Carby v. *Greco* (D. C. Ky.), 31 Fed. Supp. 251, 254;

Melekov v. *Collins* (D. C. Cal.), 30 F. Supp. 159.

POINT III

No authoritative case is cited sustaining the rule adopted by the Circuit Court of Appeals in this case.

McCormick Harvesting Mach. Co. v. *Walthers*, 134 U. S. 41, 33 L. Ed. 833;

Munter v. *Weil Corset Co.*, 261 U. S. 276, 67 L. Ed. 652;

Seaboard Rice Milling Co. v. *C., R. I. & P. R. Co.*, 270 U. S. 363, 70 L. Ed. 633;

Massachusetts Bonding & Ins. Co. v. *Concrete Steel Bridge Co.*, 4 Cir., 37 Fed. (2d) 695;

Schwarz v. *Artcraft Silk Hosiery Mills*, 2 Cir., 110 Fed. (2d) 465;

Williams v. *James* (D. C. La.), 34 Fed. Supp. 61;

Coastal Club v. *Shell Oil Co.*, 45 Fed. Supp. 859;

Andrews v. *Joseph Cohen & Sons*, 45 Fed. Supp. 732;

O'Leary v. *Loftin* (D. C. N. Y.), 3 F. R. D., 36;

Swerling v. *New York & Cuba Mail S. S. Co.* (D. C. N. Y.), 33 Fed. Supp. 721;

Salvatori v. *Miller Music, Inc., et al.*, 35 Fed. Supp. 485;

Schwarz v. *Artcraft Silk Hosiery Mills*, 110 F. 2d 465.

POINT IV

This suit could only be maintained in the District Court of the United States for the Southern District of Mississippi which embraced Hinds County, Mississippi, where the cause of action accrued.

Forman v. *Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. (2d) 344;

Cohen et al. v. *American Window Glass Co.*, 126 Fed. (2d) 111;

Neirbo Co. v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437;

Oklahoma Packing Co. v. *Oklahoma Gas and Electric Co.*, 100 Fed. (2d) 770 (C. C. A. 10);

Ward v. *Studebaker Sales Corp.*, 113 Fed. (2d) 567 (C. C. A. 3);

Dehne v. *Hillman Inv. Co.*, 110 Fed. (2d) 456 (C. C. A. 3);

North Butte Mining Co. v. *Tripp*, 128 Fed. (2d) 588 (C. C. A. 9);

Atchison, T. & S. F. Ry. Co. v. *Drayton* (8th Circuit), 292 Fed. 15;

Birdwell v. *Indemnity Ins. Co.* (D. C. S. D. Texas), 48 Fed. Supp. 950.

POINT V

The respondent was not a resident of the Northern District of Mississippi but resided in the Southern District of Mississippi.

Sartor v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967;

Crites, Inc., v. *Prudential Ins. Co.*, 322 U. S. 408, 64 S. Ct. 1075, 88 L. Ed. 1356.

District of Columbia v. Henry C. Murphy, 314 U. S. 441, 86 L. Ed. 329;

Philadelphia R. Co. v. *McKibbin*, 243 U. S. 264, 61 L. Ed. 710;

Gilbert v. *David*, 235 U. S. 561, 59 L. Ed. 360;

Granite Trading Corp. v. *Harris*, 80 Fed. (2d) 174, (4 Cir.);

Wright v. *Schneider* (C. C., E. D. Mo., 1887), 32 Fed. 705;

Pacific Ins. Co. v. *Tompkins* (4 Cir., 1900), 101 Fed. 539;

Tudor v. *Leslie* (D. C. Mass., 1940), 35 Fed Supp. 969;

Causey v. *Lockridge* (D. C. S. C., 1938), 22 Fed. Supp. 692;

Prince v. *New York Life Ins. Co.* (D. C. Mass., 1938), 24 Fed. Supp. 41;
Bank of Cruger v. *Hodge*, 189 Miss. 356, 198 So. 26;
Ritter v. *Whitesides*, 179 Miss. 706, 176 So. 728;
McHenry v. *State*, 119 Miss. 289, 80 So. 763;
Hattiesburg v. *Mollers*, 118 Miss. 154, 79 So. 87;
Hairston v. *Hairston*, 27 Miss. 704.

VII

Argument.

Point I

The United States District Court for the Northern District of Mississippi was without jurisdiction of this case and the District Judge correctly sustained petitioner's motion to dismiss. The Circuit Court of Appeals has decided a Federal question in a way in conflict with applicable decisions of this Court and in conflict with the decisions of other Circuit Courts of Appeal on the same matter.

It was conceded in the Courts below that the petitioner was a Delaware corporation having its only and principal place of business in Mississippi at Jackson where it had appointed an agent for service of process; that it had transacted no business of any kind in the Northern District of Mississippi; that it was not present therein; that it had no office, officer, agent, or servant in the Northern District of Mississippi; but that in Jackson, in the Southern District of Mississippi, it had its offices where its officers resided, its books and records were kept, and its corporate business transacted.

The District Court for the Northern District of Mississippi was without power to proceed in this case because it was without jurisdiction. It was necessary in order that it might entertain the case that it have jurisdiction of the

parties; that is to say, the plaintiff, respondent, the defendant, petitioner, as well as the subject matter.

The elements of jurisdiction are:

(a) That the Court have cognizance of the class of case in which the one to be adjudged belongs;

(b) That the proper parties are before the Court.

In personal actions there must be jurisdiction both of the subject matter and of the person, that is to say, the Court must have jurisdiction of the subject matter and personal jurisdiction of the defendant. The latter is usually known as venue or territorial jurisdiction.

In *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684, the Court refers to venue as "local jurisdiction". The jurisdiction of the District Courts of the United States comes from art. 3, Sections 1, 2, Constitution of the United States; Section 41, Title 28, U. S. C. A.

Illinois Central R. Co. v. *Adams*, 180 U. S. 28, 21 S. Ct. 251, 45 L. Ed. 410; *Re Indiana Transp. Co.*, 244 U. S. 456, 37 S. Ct. 717, 61 L. Ed. 1253; *Erickson* v. *United States*, 264 U. S. 246, 44 S. Ct. 310, 68 L. Ed. 661; *United States* v. *Arredondo*, 6 Pet. 691, 709, 8 L. Ed. 547; *Lessee of Grignon* v. *Astor*, 2 How. 319, 338, 11 L. Ed. 283, 290.

The question, however, of venue or territorial jurisdiction, that is to say, the place where a suit may be filed, is exclusively for the determination of Congress. Venue may be fixed in no other manner and by no other authority. This is a personal action transitory in nature.

The jurisdiction and venue of suits in District Courts of the United States is expressly provided by the Acts of Congress. Sections 112 and 113, Title 28, U. S. C. A., pro-

vide the district in which civil suits shall be brought. Paragraph (a) thereof contains the following provision:

> "(a) Except as provided in Sections 113 to 117 of this title, no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

The foregoing is the basic general provision as to where civil suits shall be filed in the District Courts of the United States. The requirement is that the suit shall be brought in the district whereof the defendant is an inhabitant. The right to be immuned from suit except as provided in the foregoing provision is a substantial right of the defendant. The paragraph, however, contains the following provision:

> "* * * but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The provision contained in the statute last above quoted does not enlarge the territorial jurisdiction of the Court; upon the other hand, the provision is restricted.

In *Ex parte Shaw*, 145 U. S. 444, 36 L. Ed. 768, 771, this Court, through Mr. Justice Gray, used the following language:

> "The Act of 1887, both in its original form and as corrected in 1888, re-enacts the rule that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, but omits the clause allowing a defendant to be sued in the district where he is found, and adds this clause: 'but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' 24 Stat. at L.

552; 25 Stat. at L. 434. As has been adjudged by this court, the last clause is by way of proviso to the next preceding clause, which forbids any suit to be brought in any other district than that whereof the defendant is an inhabitant; and the effect is that 'where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides.' McCormick Harvesting Mach. Co. v. Walthers, 134 U. S. 41, 43 (33:833, 834). And the general object of this Act, as appears upon its face, and as has been often declared by this court, is to contract, not to enlarge, the jurisdiction of the circuit courts of the United States. Smith v. Lyon, 133 U. S. 315, 320 (33:635, 637); Re Pennsylvania Co., 137 U. S. 451, 454 (34:738, 740); Fisk v. Henarie, 142 U. S. 459, 467 (35:1079, 1082.)"

Under the foregoing section it was necessary in order that jurisdiction of the person of the petitioner might be had that it be present within the territorial jurisdiction of the Court. This section applies to states having one federal judicial district and venue may not be had therein and territorial jurisdiction obtained over petitioner unless within the territorial jurisdiction of the Court. This is not an action of a local nature but transitory. The statute confers no territorial jurisdiction except as to a defendant within the territorial jurisdiction of the Court. It does not contemplate or permit the issuance of process to another state or district. If the plaintiff be a resident of the District, the defendant must be a foreign corporation engaged in business therein; if the plaintiff be a non-resident of the State of Mississippi, the defendant must be a resident or inhabitant of the district, or, since the *Neirbo* case, a foreign corporation consenting to be sued within the district in which the suit is brought.

This section has application where there are one or more defendants residing in the same district. Section 113 contains the following language:

> "Judicial Code, section 52. Suits in States containing more than one district. When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides."

It is perfectly obvious that the word "inhabitant" in Section 112 and the word "resident" in Section 113 are synonymous.

The last mentioned section has application where a state contains more than one district and there are one or more defendants residing in different districts. The petitioner in this case was the sole defendant. It had never transacted business of any character in the Northern District of Mississippi; it had for some years, however, transacted business in the Southern District of Mississippi, with its only office and place of business in Jackson, Mississippi, where the cause of action accrued, if any, and where its agent for service of process resided.

This case involved more than the question of venue or territorial jurisdiction. It involved the question of personal jurisdiction over the petitioner. Personal jurisdiction over a foreign corporation could be obtained whether the suit was brought by a resident or non-resident of the state only in the district where the foreign corporation trans-

acted business. The District Judge so held, using the following language:

> "In the Court's judgment the Rules of Civil Procedure have not in any way enlarged either the jurisdiction or venue of the District Court.
>
> "As I read the opinion of the Supreme Court of the United States in Neirbo Co. vs. Bethlehem Corporation—308 U. S. 167—what the Court holds is in substance that for purposes of jurisdiction the Court will still recognize the legal fiction of citizenship of a corporation in the State of its incorporation; but that for purposes of venue it will adopt the practical and realistic view that such corporations are domiciled in any District where they do business and have in accordance with the mandates of State law appointed agents for the service of process.
>
> "If this be the correct view of the holding in the Neirbo case it follows that under Section #113 of the Judicial Code the defendant in this case, is in that limited sense, an inhabitant of the State of Mississippi, and entitled to be sued in the District of the State where it resides.
>
> "It follows that there is not proper venue in the Northern District of Mississippi and the motion to dismiss for want of venue is sustained.
>
> "This holding is in line with St. Louis S. W. Railroad vs. Alexander—227 U. S. 218—and in the Court's judgment presents a clear and workable application of the Rules of Civil Procedure and the rules of law as announced in the Neirbo and the St. Louis S. W. Railroad case above referred to."

Since there are two federal districts in Mississippi and petitioner was the sole defendant, under the positive provisions of Section 113, the suit could only be maintained in the district in which the petitioner was an inhabitant. The United States Circuit Court of Appeals incorrectly held that Section 113 was only a supplement to Section 112. This holding is in conflict with the decision of this Court

in *Stonite Products Co.* v. *Melvin Lloyd Company*, 315 U. S. 561, 86 L. Ed. 1026, wherein it is held that Section 113 announces the exception to the Rule announced in Section 112. The petitioner transacted business in the Southern District of Mississippi where it appointed an agent for service of process, consented to be sued therein, which was the equivalent for jurisdiction and venue purposes of its being an inhabitant of the Southern District of Mississippi.

In the case of *The Galveston, Harrisburg & San Antonio Railway Company* v. *Victor Gonzalez*, 151 U. S. 496, 38 L. Ed. 248, it is expressly held that where there are two districts within a state a suit against a corporation must be filed where its general offices are located.

The question was stated with accuracy and clearness in the case of *St. Louis S. W. R. Co.* v. *Alexander*, 227 U. S. 218, 57 L. ed. 486, 488. In that case suit was filed in the state court of New York against the appellant, a foreign corporation. The case on the petition of the appellant was removed to the United States District Court for the Southern District of New York. There the appellant sought to have the suit dismissed for want of jurisdiction over it because it alleged that it was a foreign corporation, had never transacted any business in the Southern District of New York and, therefore, the Court had acquired no jurisdiction over it. This Court announced the following rule applicable thereto:

> "The other question as to the presence of the corporation within the jurisdiction of the court in which it was sued raises more difficulty. A long line of decisions in this court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof. Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; Goldey v. Morning News,

156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807; Peterson v. Chicago, R. I. & P. R. Co., 205 U. S. 364, 51 L. ed. 84, 27 Sup. Ct. Rep. 513; Green v. Chicago, B. & Q. R. Co., 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595; Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. ed. 272, 30 Sup. Ct. Rep. 125; Herndon-Carter Co. v. James N. Norris Son & Co., 224 U. S. 496, 56 L. ed. 857, 32 Sup. Ct. Rep. 550."

In *Green* v. *C. B. & Q. Ry. Co.*, 205 U. S. 530, 51 L. Ed. 916, the Court said:

"The question here is whether service upon the agent was sufficient; and one element of its sufficiency is whether the facts show that the defendant corporation was doing business within the district. It is obvious that the defendant was doing there a considerable business of a certain kind, although there was no carriage of freight or passengers. In support of his contention that the defendant was doing business within the district in such a sense that it was liable to service there, the plaintiff cites Denver & R. G. R. Co. v. Roller, 49 L. R. A. 77, 41 C. C. A. 22, 100 Fed. 738, and Tuchband v. Chicago & A. R. Co. 115 N. Y. 437, 22 N. E. 360. The facts in those cases were similar to those in the present case But in both cases the action was brought in the state courts, and the question was of the interpretation of a state statute and the jurisdiction of the state courts.

"The business shown in this case was, in substance, nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it. This view accords with several decisions in the lower Federal courts. Maxwell v. Atchison, T. & S. F. R. Co. 34 Fed. 286; N. K. Fairbank & Co. v. Cincinnati, N. O. & T.

P. R. Co. 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 420; Union Associated Press v. Times-Star Co. 84 Fed. 419; Earle v. Chesapeake & O. R. Co. 127 Fed. 235."

In *Bank of America* v. *Whitney Central National Bank*, 261 U. S. 171, 67 L. Ed. 594, 596, the Court said:

> "The jurisdiction taken of foreign corporations, in the absence of statutory requirement or express consent, does not rest upon a fiction of constructive presence, like qui facit per alium facit per se. It flows from the fact that the corporation itself does business in the state or district in such a manner and to such an extent that its actual presence there is established. That the defendant was not in New York, and hence, was not found within the district, is clear."

Other cases directly in point are:

Peoples Tobacco Co. v. *American Tobacco Co.*, 246 U. S. 79, 62 L. Ed. 587; *Green* v. *C. B. & Q. Ry. Co.*, 205 U. S. 530, 51 L. Ed. 916; *Lafayette Ins. Co.* v. *French*, 18 How. 404, 15 L. Ed. 451; *St. Clair* v. *Cox*, 106 U. S. 350, 27 L. Ed. 222; *Goldey* v. *Morning News*, 156 U. S. 518, 39 L. Ed. 517; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113; *Geer* v. *Mathieson Alkali Works*, 190 U. S. 428, 47 L. Ed. 1122; *Peterson* v. *Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 51 L. Ed. 841; *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437, 54 L. Ed. 272.

The decision of the Circuit Court of Appeals in this respect is in conflict with the following decisions of other Circuit Courts of Appeals on the same matter:

Sperry Products, Inc. v. *Association of American Railroads*, 2 Cir., 132 Fed. (2d) 408; *London* v. *N. & W. Ry. Co.*, 4 Cir., 111 Fed. (2d) 127; *McCall Co.* v. *Bladsworth*, 290 Fed. 365, 2 Cir.; *Sewchulis* v. *Lehigh Valley Coal Co.*, 2 Cir., 233 Fed. 422.

The position of the respondent is that since there was diversity of citizenship and the subject matter was of the character of which the Court had jurisdiction and in view of

the fact that the petitioner had appointed an agent for service of process in the State of Mississippi, it had waived all question of jurisdiction and venue and consented that it might be sued in any Court, state or federal, in the State of Mississippi.

Section 5319, *Mississippi Code 1942*, required the petitioner to designate an agent for service of process. A copy of the statute is made *Appendix "C"* hereto.

It is the position of the petitioner that the appointment of an agent for the service of process merely provides a method of serving process upon the litigant making the appointment, but that any suit must be filed in a Court having jurisdiction over such defendant and the venue must be properly laid, that is to say, the mere appointment of an agent for service of process does not determine the question of jurisdiction or venue but merely gives consent by the defendant to be sued in a county or district of the state where the Court has jurisdiction and the venue properly laid.

The Supreme Court of Mississippi has expressly held that the Mississippi statute requiring the appointment of an agent for service of process does not constitute a waiver of the litigant to question either the jurisdiction of the Court or the venue of the action. The statute means that the appointment is state-wide and the litigant has consented to be sued in any Court, State or Federal, in the state where the Court has jurisdiction and the venue is properly laid.

The case of *Forman v. Mississippi Publishers Corporation*, 195 Miss. 90, 14 So. (2d) 344, is directly in point. In that case the appellant sued the appellee in the Circuit Court of Sunflower County for an alleged libelous publication contained in newspapers published by the appellee and circulated for the first time in Jackson, the First Judicial District of Hinds County, Mississippi, the domicile of the appellee. The appellant's declaration alleged that the cause of action accrued in Sunflower County, Mississippi,

where the newspaper circulated. The trial Judge dismissed the suit for lack of jurisdiction and because the venue was improperly laid. In affirming the case the Supreme Court of Mississippi used the following language:

> "The venue is to be determined from a construction of Code 1930, Section 495, Amended by Chapter 248, Laws 1940: 'Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of them may be found, and if the defendant is a domestic corporation, in the county in which said corporation is domiciled, or in the county where the cause of action may occur or accrue * * *.' The defendant, although a foreign corporation, has appointed a resident agent and is subject to the same rights and disabilities as to venue as are domestic corporations. *Standford* v. *Dixie Construction Co.*, 157 Miss. 626, 128 So. 887. The newspaper here involved is edited, composed and issued in Hinds County. It is also, in both a popular and technical sense, there published. The question therefore further narrows to a construction of the quoted statute which requires venue in the county 'where the cause of action may occur or accrue.' "

Venue of actions in the State of Mississippi is provided in Section 1433, *Mississippi 1942 Code*, and is made *Appendix "D"* to this brief.

The Supreme Court of the State of Mississippi, in construing the statute requiring the appointment of an agent for service of process, expressly in the above case held that neither the question of jurisdiction nor venue were in any manner changed but that the suit should be filed where the cause of action accrued. Such construction, of course, is binding upon this Court. The construction placed upon a state statute by the Courts of the state is binding upon the Federal Courts. *Guaranty Trust Co.* v. *Blodgett*, 287 U. S. 509, 77 L. Ed. 463; *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109, 81 L. Ed. 540; *Schuylkill*

Trust Co. v. *Pennsylvania,* 302 U. S. 506, 82 L. Ed. 392; *Bacon* v. *Martin,* 305 U. S. 380, 83 L. Ed. 233; *Joseph Dixon Crucible Co.* v. *Paul,* 5 Cir., 167 Fed. 784.

In the case of *Turner* v. *Board of Trade of City of Chicago* (Cert. denied, 245 U. S. 667, 62 L. Ed. 538), 7 Cir., 244 Fed. 108, the Court used the following language:

> "Respondent is organized under the laws of the State of Illinois. As a general rule, the construction which the highest court of a state has given to a statute of a state becomes a part thereof and should be read into it. *Douglas* v. *County of Pike,* 101 U. S. 677, 25 L. Ed. 968."

In the case of *Waterman* v. *Canal Bank & Trust Co.,* 5 Cir., 186 Fed. 71 (Cert. denied, 220 U. S. 621, 55 L. Ed. 613), the Court used the following language:

> "The construction which the Supreme Court of Louisiana has placed on these articles of the Civil Code should be controlling in the federal courts. Such construction becomes, in effect, a part of the statute, to be enforced by this court as it would be enforced by the Louisiana courts had the complainant selected that forum."

See, also *Gregg Dyeing Co.* v. *Query,* 76 L. Ed. 1232, 286 U. S. 472; *Gatewood* v. *State of North Carolina,* 203 U. S. 531, 51 L. Ed. 305; *Green* v. *Frazier,* 253 U. S. 233, 64 L. Ed. 878.

In *St. Mary's Petroleum Co.* v. *West Virginia,* 203 U. S. 183, 27 S. Ct. 132, 51 L. Ed. 144, the Court said:

> "The construction and effect given by the state court to a state statute of this character, or to a power of attorney executed pursuant thereto, will be followed by federal courts sitting within that jurisdiction. Pennsylvania Fire Insurance Co. v. Gold Issue Co., 243 U. S. 93, 37 S. Ct. 344, 61 L. Ed. 610; Louisville Railway Co. v. Chatters, 279 U. S. 320, 49 S. Ct. 329, 73 L. Ed. 711; Maichok v. Bertha-Consumers Co., (C. C. A.) 25 Fed.

(2d) 257; Smolik v. Philadelphia Iron Co. (D. C.) 222 F. 148; Mooney v. Buford Co. (C. C. A.) 72 F. 32.

* * * * * * *

"And as was well said by Mr. Justice Holmes, in Mitchell Furniture Co. v. Selden Breck Co., 257 U. S. 213, 42 S. Ct. 84, 85, 66 L. Ed. 201, at page 203:

"'Of course, when a foreign corporation appoints one (Statutory attorney), as required by statute, it takes the risk of the construction that will be put upon the statute and the scope of the agency by the state court.'

"See, also, Bagdon v. Philadelphia Iron Co., 217 N. Y. 432, 111 N. E. 1075, L. R. A. 1916F, 407, Ann. Cas. 1918A, 389."

There is nothing to the contrary in the case of *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 84 L. Ed. 167, 128 A. L. R. 1437, or the case of *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4, 84 L. Ed. 537. In the *Neirbo* case a resident of New Jersey brought suit in the United States District Court for the Southern District of New York against several corporate defendants; one of them, the Bethlehem Corporation, a Delaware corporation, which maintained its principal office and was engaged in business in the Southern District of New York. The Bethlehem took the position that it could not be sued by a non-resident of New York except at its domicile. This Court held that by the appointment of an agent for the service of process, the defendant had consented to be sued in the federal courts of New York in the district where it was engaged in business and maintained its principal office and place of business, that is to say, before a Court having jurisdiction of it and where the venue was properly laid. The question in that case was as to whether or not a foreign corporation, though maintaining its principal place of business, could be sued therein by a non-resident of the state. This Court held that the Bethlehem, having appointed an

agent for the service of process under the laws of New York, had waived any objection which it might otherwise assert against being sued in a federal court by a non-resident of New York other than at the place of its domicile and had consented to be sued in the federal court of the State of New York in a district where it maintained its principal place of business before a Court having jurisdiction over it. The opinion in the *Neirbo* case was bottomed upon the case of *Ex Parte Schollenberger,* 96 U. S. 369, 24 L. Ed. 853, where it was held that a foreign insurance company, as a condition precedent to doing business in the State of Pennsylvania, appointed an agent for service of process, had consented to be sued in the state and might be sued in the Federal Court of the district in which said company transacted business by a citizen of the State of Pennsylvania.

The *Schollenberger* case refers to the case of *Baltimore & Ohio R. Co.* v. *Harris,* 12 Wall. 65, 20 L. Ed. 354, where a foreign railroad corporation was transacting business in the District of Columbia, where it had consented to be sued. The Court held that suit might be maintained in the District Court of the United States within the District by a non-resident of the District.

The *Neirbo* case is based upon the philosophy that the Bethlehem, having appointed an agent for service of process, it had consented to be sued in any court in the state, state or federal, having jurisdiction where the venue was properly laid, that the Bethlehem had waived its right to assert that it could only be sued by a non-resident in the state of its domicile. The status occupied by the Bethlehem under such circumstances was equivalent to and for practical jurisdiction or venue purposes that of a resident or inhabitant of the district in which it transacted business. The Court did not decide that the Bethlehem was subject to suit either by a resident or non-resident of the State of New York in any district other than that in which it was engaged

in business. Judge Frankfurter used the following language:

> "It does not enlarge or diminish jurisdiction of the subject-matter. It means that whenever jurisdiction of the subject-matter is present, service on the agent shall give jurisdiction of the person. Bagdon v. Philadelphia & R. Coal & I. Co., 217 N. Y. 432, 436, 437, 111 N. E. 1075, LRA 1916F, 407 Ann. Cas. 1918A, 389."

It will be noted that in the case of *Bagdon* v. *Philadelphia & R. Coal & I. Co.*, 217 N. Y. 432, 111 N. E. 1075, LRA 1916F, 407 Ann. Cas. 1918A, 389, the suit was filed against a foreign corporation transacting business within the jurisdiction of the Court and the Court announced that the appointment of an agent for service of process was for no other purpose than to provide a convenient method of serving the defendant.

The case of *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4, 84 L. Ed. 537, is identical in principle with the *Neirbo Case*.

In the case of *Ex Parte Schollenberger, supra*, the Court held that although the foreign corporation had consented to be sued in the state that it was not necessary to decide as to whether or not such foreign corporation became an inhabitant of the state within the venue statute.

In the case of *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 36 L. Ed. 768, the Court held that as to individuals the words "inhabitant" and "resident" in the venue statutes were synonymous.

The case of *Schwarz* v. *Artcraft Silk Hosiery Mills*, 2 Cir., 110 F. 2d 465, 467, interpreted the opinion of this Court in the *Neirbo Case* to mean that a foreign corporation is to be treated as a resident of the district in which it transacts business. The Court used the following language, page 467:

"Schwarz was alleged to be a stockholder and also a director of the corporation. In Philipbar v. Derby, 2 Cir., 85 F. 2d 27, we held that 28 U. S. C. A. Sec. 112, so limited the venue in a derivative suit by a stockholder of a corporation that such a suit could be brought in a federal court only in a district where the corporation might have brought it. Since the decision in Neirbo Company et al. v. Bethlehem Shipbuilding Corporation, Ltd., 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. —, Nov. 22, 1939, it may be that this corporation is to be treated as a resident of the Southern District of New York. We leave that open for the present as we think the objection as to venue is futile in any event."

In the recent case of *Moss* v. *Atlantic Coast Line R. Co.*, 2 Cir., 149 Fed. (2d) 701, it is distinctly held that a foreign corporation doing business in a state by the appointment of an agent for service of process is a resident of the state, citing the *Neirbo Case*.

In the case of *Thomas* v. *South Butte Mining Co.*, 9 Cir., 230 Fed. 968, 969, the following language was used:

"First, that the trial court had no jurisdiction of the cause, for the reason that it was not alleged in the appellee's complaint that the South Butte Mining Company, which was alleged to be corporation of Minnesota, was also an 'inhabitant' of that state; the allegation being that it was a citizen and 'resident' of that state. We need devote no time to discussion of this point. It has always been held, in construing the acts of Congress which define the jurisdiction of the federal courts, that the word 'inhabitant' is synonymous with 'resident.' Bogue v. Chicago, B. & Q. R. Co. (D. C.) 193 Fed. 728, 733; Stone v. Chicago, B. & Q. R. Co. (D. C.) 195 Fed. 832; Bicycle Stepladder Co. v. Gordon (C. C.) 57 Fed. 529; Shaw v. Quincy Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; United States v. Penelope, 2 Pet. Adm. 438, 27 Fed. Cas. 486."

The decision is in conflict with the following cases:

Electric Switch Co. v. *United States Gauge Co.*, 7 Cir., 129 Fed. (2d) 166; *Sewchulis* v. *Lehigh Valley Coal Co.*, 2 Cir., 233 Fed. 422.

Upon the question that the appointment of an agent for service of process in a state is state-wide, counsel cite the case of *Sanford* v. *Dixie Const. Co.*, 157 Miss. 626, 128 So. 887. There the appellee, a foreign corporation, had its principal office and place of business in Harrison County, Mississippi where it appointed an agent for service of process. The cause of action complained of, however, occurred in Forrest County where the appellee was engaged in some kind of construction work. The Court held that under the Mississippi statutes a domestic corporation could be sued either at its domicile or where the cause of action arose, and that a foreign corporation would be placed upon exactly the same basis; and since the cause of action arose in Forrest County suit might be filed there and process served on the resident agent in Harrison County, Mississippi.

The Court did hold that the appointment of an agent for service of process was statewide, but held that the venue must be laid either in the county where the cause of action arose or where the corporation maintained its domicile if a domestic corporation, or had its principal place of business if a foreign corporation. The case of *Tri-State Transit Company* v. *Mondy*, 194 Miss. 714, 12 So. 2d 920, as well as the case of *Forman* v. *Mississippi Publishers Corporation*, *supra*, reaffirm this holding.

Venue in Mississippi as to foreign and domestic corporations is regulated by Section 5319, *Miss. 1942 Code*, a copy of which is made appendix to this Brief. It will appear from the foregoing citations that merely because a foreign corporation appoints an agent for service of process in the

state that it does not consent to be sued in any county in the state. It consents to be sued before a Court having jurisdiction where the venue is properly laid.

Counsel confuse place of service under the state statute with place where suit may be filed. Where suit is filed against a corporation, foreign or domestic, and the venue properly laid, process may issue to any county in the state for service on the process agent. Neither jurisdiction nor venue are determined by such residence.

The decision of the Circuit Court of Appeals in this case if affirmed will produce great inconvenience, expense, and hardship. The petitioner, although an inhabitant of the Southern District of Mississippi and has never transacted any business of any character in the Northern District, is required to go to the inconvenience and expense of defending itself in the United States District Court some 200 miles from the location of its principal and only office in the State of Mississippi, where, under the Mississippi statute, the cause of action, if any, accrued, its agent for service of process resides and, under the state law, the suit would have to be filed.

If the Rule announced for the Circuit Court of Appeals in this case is to prevail, a foreign corporation having its principal and only office in the State of Texas in Brownsville, in the Southern District, could be required at the suit of an alleged resident of Texas, residing in the Northern District thereof, to defend a suit not of a local nature arising in the Southern District of Texas at Amarillo, Texas, approximately 900 miles distant, or a resident of the Southern District having a cause of action might move to the extreme Northern District, acquire a residence and require the defendant to appear and defend the suit in the Northern District. A corporate defendant residing at El Paso, Texas, could be required to defend a suit, not of a local

nature, arising in El Paso in the Western District of Texas in Beaumont, in the Eastern District of the State of Texas, some 800 miles distant. In California a corporate defendant residing in the Southern District of the state, upon the same ground, could be required to go a thousand or twelve hundred miles to make its defense in an action, not of a local nature, arising in the Southern District. Other instances of inconvenience and deprivation of substantial rights might be stated.

Venue in civil actions is fixed by Act of Congress primarily for the convenience of the defendant. *Lehigh Valley Coal Co.* v. *Yensavage*, 2 Cir., 218 Fed. 547.

Title 28, U. S. C. A., Section 109, provides venue for patent cases at the domicile of the defendant or where the infringement took place. Section 110, providing venue for suits against National Bank Associations, requires such suit to be brought at the domicile of the Bank. Section 112 requires suit to be filed in civil actions where the defendant is an inhabitant, and Section 113 makes the same provision where a State contains more than one district. Section 114 provides venue where there is more than one division in a district. Where a district contains more than one division, suit must be filed in the division of which the defendant is an inhabitant. Section 116 provides where the subject matter is of a fixed character and lies partly in one district and partly in another, the suit may be brought in either district. Section 118 provides that suits to enforce liens on property shall be brought in the district where the property is situated. Under the Seaman Act suit must be brought in the district in which the employer resides or where his principal place of business or office is located. 46 U. S. C. A. 688.

Venue under anti-trust laws is fixed in the district where defendant is an inhabitant, or where it may be found or transacts business. 15 U. S. C. A., Section 22.

In acts under the Motor Vehicle Act, suit may be brought in any district where the party complained of is found or where the wrong is committed. 49 U. S. C. A. Section 321, paragraph (c).

The rule adopted by the Circuit Court of Appeals in this case would be in direct conflict with the general policy of Congress in fixing venue of local actions, as appears from the foregoing statutes.

POINT II

The Circuit Court of Appeals committed error in deciding that under Rule 4(f) personal jurisdiction might be obtained over the petitioner in a transitory action filed in the United States District Court for the Northern District of Mississippi, although the petitioner was not present in the District. In this respect the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court. The decision of the Circuit Court of Appeals is contrary to that of other Circuits and if Rule 4(f) of Rules of Civil Procedure was correctly construed by the Circuit Court of Appeals in this case, then such rule violates the Act of Congress of June 19, 1934 authorizing this Court to prescribe such rules as well as the order of this Court of June 3, 1935 appointing an advisory committee for such purpose.

Assuming that the respondent was a resident of the Northern District of Mississippi, it was conceded that the petitioner was a foreign corporation transacting business only in the Southern District of Mississippi where the cause of action accrued and its agent for service of process resided. Conceding such to be the facts, the United States Circuit Court of Appeals in this case decided that under Rule 4(f), Rules of Civil Procedure of the Federal District Courts of the United States, personal jurisdiction might be obtained over the petitioner by the issuance of process in the North-

ern District of Mississippi to the Marshal of the Southern District of Mississippi for service on the petitioner's agent for service of process, that is to say, although the petitioner was not within the territorial jurisdiction of the Court, it might be served in the Southern District of Mississippi.

The Court justifies its conclusion on the ground that the Rules of Civil Procedure were submitted to this Court and approved by it and that this Court, therefore, gave its sanction to the issuance of process from one district to another. The fallacy in the position of the Court is that it overlooks the difference between jurisdiction, venue, and service of process, and determines the case under Rule 4(f) without reference to Rule 82. These rules are in the following language:

Rule 4(f):

> "*Territorial Limits of Effective Service.* All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45."

Rule 82:

> "*Jurisdiction and Venue Unaffected.* These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein."

The Circuit Court of Appeals, under Rule 4(f), has determined that it may take personal jurisdiction of the petitioner, a corporation beyond the jurisdiction of the Court, notwithstanding the clear and unambiguous provision in Section 82 to the contrary. The Court states that it could not take jurisdiction of the subject matter but may

take personal jurisdiction of the petitioner. However, Rule 82 says that the Rules shall not be construed to extend or limit the jurisdiction of the District Courts of the United States or the venue therein. The Rule is all-comprehensive, does not require any construction, it is only necessary that the Rule be observed. The position of the Court seems to be that since the plaintiff claims to be a resident of the Northern District of Mississippi and the petitioner, a foreign corporation, that there is diversity of citizenship, and it was only necessary that the respondent be a resident of the District, but it was necessary that the petitioner be within the jurisdiction of the Court and this jurisdiction could not be obtained under Rule 4(f) because Rule 82 provides to the contrary. Neither jurisdiction nor venue may be supplemented by Rule 4(f). Jurisdiction and venue depend upon the Constitution of the United States and the Acts of Congress in respect thereto and may not be limited or extended by any Rule of Court.

It is the position of the petitioner that Rule 4(f) assumed that jurisdiction was had by the Court and venue was properly laid, that is to say, there might be two or more defendants, one or more of them residing in another district from that in which the suit was brought, or suit might be brought against a single defendant, a single corporate defendant having an agent for service of process, however residing in another district from that in which the suit was brought. Suppose, for instance, that the petitioner was transacting business in the Northern District of Mississippi, having, however, an agent for service of process in the Southern District: In such instance, Rule 4(f) would become operative and process might issue to the Southern District for service upon the process agent.

The decision of the Circuit Court of Appeals in this case is in direct conflict not only with the Acts of Congress fix-

ing venue and jurisdiction, but is in conflict with the Circuit Courts of Appeals of other circuits.

We refer the Court to the case of *Contracting Division A. C. Horne Corp.* v. *New York Life Ins. Co.*, 2 Cir., 113 Fed. (2d) 864. In that case the Research Laboratories, Inc., referred to as the Research, and the Contracting Division A. C. Horn Corporation, resided in the Eastern District of the State of New York. The former was the owner of a patent of which the latter was licensee. The Contracting Division Corporation filed suit in the Southern District of New York against the New York Life Insurance Company for an infringement of the patent. The New York Life Insurance Company wished to have the Research Corporation a party plaintiff so that it might file a counterclaim against each of said corporations.

It made application under Federal Rules of Civil Procedure 13(b), 19(a) and Rule 21 to that end. In order, however, to maintain a counterclaim against the Research Corporation, it was necessary that process issue from the Southern District of New York to the Eastern District of New York and since neither of these corporations were incorporated or had offices in the Southern District the appellant would be unable to get process to issue on its application to require both corporations to join as plaintiff. Rule 4(f), therefore, was directly involved and the decision is in conflict with the present case.

The Circuit Court of Appeals in denying the motion used the following language:

> "Recognizing the necessity of having the patent owner in court, the appellant moved to join Research and A. C. Horn Company as parties plaintiff, and now attacks denial of that motion as error. It relies upon Rules 13(h), 19(a), and 21 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c; but it fails to take note of Rule 82, which states that the

> rules shall not be construed to extend the jurisdiction of district courts or the venue of actions therein. Neither Research nor A. C. Horn Company is a resident of the southern district of New York, nor has either a regular and established place of business in this district. They are residents of the Eastern District of New York, and have their place of business there. This presents an insuperable obstacle to forcing them against their will into a suit in the southern district, if they be viewed as corporate entities separate and distinct from the plaintiff. Gibbs v. Emerson Electric Mfg. Co., D. C. W. D. Mo., 29 F. Supp. 810; Melekov v. Collins, D. C. S. D. Cal., 30 F. Supp. 159."

It is very true that the Court did not mention Rule 4(f) but the Rule was directly involved and the decision in conflict with the present one.

The Court cites the case of *Gibbs* v. *Emerson Electric Manufacturing Co.*, (D. C., Mo.), 29 F. Supp. 810, where the same effort was made, and the Court based its conclusion on a construction of Rule 4(f) in connection with Rule 82. The Court used the following language:

> "The statute is quite specific upon this subject. Section 109, Title 28 U. S. C., 28 U. S. C. A., Section 109, undertakes to fix the venue for suits in patent cases. Venue can only be had for the infringement of letters patent 'in the district of which the defendant is an inhabitant, or in any district in which the defendant * * * shall have committed acts of infringement and have a regular and established place of business.'
>
> "It appears conclusively that the defendant Emerson Electric Manufacturing Company is not an inhabitant of the district, and has no regular and established place of business within the district.
>
> "Rule 4(f) of the Rules of Civil Procedure permits the service of process 'anywhere within the territorial limits of the state in which the district court is held.' This liberal rule applies only where the venue will permit.

"Rule 82 specifically provides that the rule of Civil Procedure 'shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein.' "

The Court likewise cited *Melekov* v. *Collins*, (D. C., Calif.), 30 Fed. Supp. 159, where the Court held that Rule 4(f) and Rule 82, Rules of Civil Procedure, must be construed together and that process could not issue for a defendant in another district unless territorial jurisdiction was present in the Court from which the process was to issue. The Court used the following language:

"Congress has in clear language defined the limits of the rule making power of the Court in the enabling act of June 19, 1934, c. 651, Section 1, 48 Stat 1064, Title 28 U. S. C. A. Section 723b. This statute in its applicable part is as follows:

"'The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States • • • the forms of process; writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take the effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.'

"It is obvious that the only legislative authorization to establish rules to govern civil cases is such as provides solely for adjective matters in the course of litigation in controversies of a civil nature, as distinguished from substantive ones. The latter are to remain secure to all litigants. Undoubtedly Congress can enlarge the power of the district courts to send their process for service outside of the district. As far as we are informed it has not done so in actions like the one before us, except in the restrictive way of

keeping unimpaired historical substantive rights which are claimed by litigants. Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684.

"In my opinion, Rule 4(f) ex proprio vigore could not, even if there did not exist in the Federal Rules of Civil Procedure a correlative requirement, operate to compel the nonresident defendant Vaught to submit personally to the jurisdiction of this district court in the case at bar. This rule is necessarily and expressly limited in its scope by act of Congress.

"But the limitations of the scope of Rule 4(f) are not entirely dependent upon the statute which we characterize as the enabling act, supra.

"Rule 82, which is as much a part of the scheme of the modernized procedure in civil actions in the federal courts as Rule 4(f), is a definite statement that the long-established and well-settled principles of substantive rights of civil litigants remain intact. Rule 82 is as follows:

> " 'Rule 82. Jurisdiction and Venue Unaffected.
>
> " 'These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States for the venue of actions therein.'

"In Sewchulis v. Lehigh Valley Coal Co., 233 F. 422, the Second Circuit Court of Appeals aptly differentiates between the method of serving summons and the effect of such service when made, and shows that the latter activity is one which extends the jurisdiction of the District Court of the United States. Judge Hough, writing for the court, said:

> " 'But there is a wide difference between the method of serving a summons and the effect of such service when made. The first relates to the 'form, manner, and order of conducting and carrying on suits.' The effect of the formal act called 'service' is not a question of practice at all, but one of jurisdiction, and jurisdiction in turn must be tested by substantive law.' "

Therefore, it is apparent that the Circuit Court of Appeals for the Second Circuit in the case of *Contracting Division* v. *New York Life Insurance Company* denied the motion to permit counterclaim to be filed because of the inability of the defendant to procure process on the corporations, domiciled in the Eastern District of New York. The case is directly in point and in conflict with the present decision.

The Circuit Court of Appeals of the Second Circuit by reference made the two last mentioned cases part of its opinion.

We respectfully submit that the rule was most clearly and accurately stated by Judge Charles E. Clark, of the Second Circuit, who was reporter for the Committee having in charge the adoption thereof. His statement found in *Moore's Federal Practice*, supplement to page 361, is in the following language:

> "Dean, now Circuit Judge, Charles E. Clark, Reporter for the Supreme Court's advisory Committee, said in reference to Rule 4(f): 'The question has been raised whether this is not a substantive change, one affecting jurisdiction and venue. I might say on that, it is our theory that definitely it is not. This is not a matter of either the jurisdiction of the court, what matters the court shall hear and decide, or of the venue, which is the place where certain kinds of actions shall be tried. This affects neither one of those points. It simply says that in cases where the district court already has jurisdiction and venue its process may reach as far as the confines of that state itself. In other words, that is why we consider it procedural. It is simply allowing people to be brought before the court within the entire state and not merely within one district.' Proceedings before the Cleveland Institute on the Federal Rules (1938 205-206)."

The District Judge in the present case announced the same rule.

In the following cases from other Circuit Courts of Appeals it is held that the Federal Rules of Civil Procedure in no manner enlarge or abridge jurisdiction or venue:

Sturgeon v. *Great Lakes Steel Corp.*, 6 Cir., 143 Fed. (2d) 819; *Davis* v. *Ensign-Bickford Co.*, 8 Cir., 139 Fed. (2d) 624; *Dan Cohen Realty Co.* v. *Natl. Savings & Tr. Co.*, 6 Cir., 125 Fed. (2d) 288; *Doyle* v. *Loring*, 6 Cir., 107 Fed. (2d) 337; *Sewchulis* v. *Lehigh Valley Coal Co.*, 233 Fed. 422, 2 Cir.

The District Courts of the United States with practically unanimity announce a contrary rule to that announced by the Circuit Court of Appeals in this case and are in entire accord with the decision of the District Judge in this case and the announcement of Judge Clark, Reporter of the Committee. The following cases are directly in point:

Sturgeon v. *Great Lakes Steel Corp.*, 6 Cir., 143 Fed. (2d) 819;

Davis v. *Ensign-Bickford Co.*, 8 Cir., 139 Fed. (2d) 624;

Dan Cohen Realty Co. v. *Natl. Sav. & Tr. Co.*, 6 Cir., 125 Fed. (2d) 288;

Doyle v. *Loring*, 6 Cir., 107 Fed. (2d) 337;

Sewchulis v. *Lehigh Valley Coal Co.*, 2 Cir., 233 Fed. 422.

O'Brien v. *Richtarsic* (D. C. W. D. N. Y.), 2 F. R. D., 42; *United States ex rel.* v. *Commanding Officer* (D. C. E. D. N. Y.), 3 F. R. D., 360; *United States* v. *Skilken*, 53 Fed. Supp. 14; *Herrington* v. *Jones*, 2 F. R. D., 108; *Brown Paper Mill Co.* v. *Agar Mfg. Corp.*, 1 F. R. D. 579; *Diepen* v. *Fernow*, D. C. Mich., 1 F. R. D. 378; *Adolph Salvatori* v. *Miller Music, Inc.*, 35 F. Supp. 845; *Red Top Trucking Corp.* v.

Seaboard Freight Lines, Inc., 35 F. Supp. 740; *U. S. F. & G. Co.* v. *John R. Alley & Co.*, 34 Fed. Supp. 604; *Cashmere Valley Bank* v. *Pacific Fruit & Produce Co.*, 33 Fed. Supp. 946; *Barnsdall Refining Corp.* v. *Birnamwood Oil Co.*, 32 Fed. Supp. 314; *Gibbs* v. *Emerson Elec. Mfg. Co.*, 31 Fed. Supp. 983; *Carby* v. *Greco*, 31 Fed. Supp. 251; *Kellar* v. *American Sales Book Co.*, 16 Fed. Supp. 189; *Melekov* v. *Collins*, 30 Fed. Supp. 159; *Richard* v. *Franklin County Distilling Co.* (D. C. W. D. Ky.), 38 F. Supp. 513, 514.

In addition to the opinion of the District Judge in this case, an outstanding District Court opinion is that of Judge Miller, Western District of Kentucky, *Carby* v. *Greco*, 31 Fed. Supp. 251. There suit was filed by residents of the Western District of Kentucky against non-residents of the state for injury occurring in an automobile collision. The non-residents had appointed the Secretary of State, under the laws of Kentucky, as agent for service of process but the defendants were not present and could not be found in the Western District. The Court held that jurisdiction over the person of the defendants was essential.

The Court used the following language:

> "The rule was stated in Employers Reinsurance Corp. v. Bryant, supra, as follows: 'The defendant was not before the court, and therefore it was without jurisdiction to proceed with the suit. Counsel for the petitioner assume that the presence of the defendant was not an element of the court's jurisdiction as a federal court; but the assumption is a mistaken one. By repeated decisions in this Court it has been adjudged that the presence of the defendant in a suit in personam, such as the one now under discussion, is an essential element of the jurisdiction, of a district (formerly circuit) court as a federal court, and that in the absence of this element the court is powerless to proceed to an adjudication.'"

Addressing itself to the question presented in this case, the Court used the following language:

> "Congress, of course, has the power to enlarge the jurisdiction of the District Court by statute, and make such service valid in a case of this kind. But it has not done so. The statute authorizing the adoption of the New Rules specifically refrains from doing so. Title 28 U. S. C. A. 723B. Rule 82 itself embodies this statutory restriction. In construing the rules it must be kept in mind that the method of serving a summons is procedural; the effect of such service when made is jurisdictional. Sewehulis v. Lehigh Valley Coal Co., 2 Cir., 239 F. 422; Keller v. American Sales Book Co., D. C., 16 F. Supp. 189. In the present case the effect of holding the service valid under Rule 4(f) is to obtain jurisdiction over the defendant, where jurisdiction did not exist except for the rule. Such a construction is unauthorized under Rule 82."

In the instant case the Circuit Court of Appeals of the Fifth Circuit used the following language:

> "More troublesome, perhaps, is the question whether the court of the Northern District could obtain jurisdiction over the person of the defendant by service of process outside the district. This question relates to the power of the Supreme Court to promulgate Rule 4(f) of the Federal Rules of Civil Procedure? While the rule affects neither venue nor jurisdiction over the subject matter, it does permit the court to acquire personal jurisdiction over a defendant in another district within the state in a case like the present—a power that did not exist prior to the adoption of the rules. As was pointed out in Moore's Federal Practice, Vol. 1, page 361, 'Since the Advisory Committee specifically called the attention of the Supreme Court to the question of its power to promulgate this rule, it may be safely assumed that the Supreme Court, by promulgating the rule, has concluded that it has the power.'"

It is necessary in order to appreciate the statement of the Committee in specifically calling the attention of this Court to the question of the power to promulgate this rule to refer to the decisions of this Court upon that subject prior thereto: It has been repeatedly held by this Court that except where specifically authorized by a federal statute, the civil process of a federal District Court does not run outside the district, and that service outside of the district is void. *Toland* v. *Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Munter* v. *Weil Corset Co.*, 261 U. S. 276, 43 S. Ct. 347, 67 L. Ed. 652; *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 45 S. Ct. 621, 69 L. Ed. 1119; *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374, 57 S. Ct. 273, 277, 81 L. Ed. 289.

The inconvenience arising from the previous Rule may nowhere be better illustrated than in the case of *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374, 81 L. Ed. 289. In that case the appellant was sued in a state court in the State of Texas. It was transacting business in the Eastern District of the State of Texas. It had an agent for service of process in the Western District. The petitioner removed the case of the United States District Court for the Eastern District of Texas and there filed a motion to dismiss the process because the same was served in a district different from that in which the appellant was transacting business. By removing the case from the state court to the federal court both jurisdiction and venue were perfect. The only objection was that although jurisdiction and venue were perfect the process had been served on the appellant in a district other than that in which it transacted business.

See, also, to the same effect, *Venner* v. *Great Northern R. Co.*, 209 U. S. 24, 52 L. Ed. 666.

In the case of *United States* v. *Alaska Packers Assn.*, C. C. A. D. C., 30 Fed. (2d) 564, following the rule announced

in the *Robertson* Case, the Court used the following language:

> " 'Congress has also made a few clearly expressed and carefully guarded exceptions to the general rule of jurisdiction in personam stated above. In one instance, the Credit Mobilier Act of March 3, 1873, c. 226, Sec. 4, 17 Stat. 485, 509 (45 U. S. C. A. Secs. 81, 88), it was provided that writs of subpoena to bring in parties defendant should run into any district. This broad power was to be exercised at the instance of the Attorney General in a single case in which, in order to give complete relief, it was necessary to join in one suit defendants living in different States. United States v. Union Pacific Railroad, 98 U. S. 569, (25 L. Ed. 143). Under similar circumstances, but only for the period of three years, authority was granted generally by Act of September 19, 1922, c. 345, 42 Stat. 849 (28 U. S. C. A. Sec. 112), to institute a civil suit by, or on behalf of, the United States, either in the district of the residence of one of the necessary defendants or in that in which the cause of action arose; and to serve the process upon a defendant in any district. The Sherman Act of July 2, 1890, c. 647, Sec. 5, 26 Stat. 209, 210 (15 U. S. C. A. Sec. 5), provides that when "it shall appear to the court" in which a proceeding to restrain violations of the act is pending "that the ends of justice require that other parties should be brought before the court" it may cause them to be summoned although they reside in some other district. The Clayton Act of October 15, 1914, c. 323, Sec. 15, 38 Stat. 730, 737 (15 U. S. C. A. Sec. 25), contains a like provision. But no act has come to our attention in which such power had been conferred in a proceeding in a Circuit or District Court where a private citizen is the sole defendant and where the plaintiff is at liberty to commence the suit in the district of which the defendant is an inhabitant or in which he can be found.' "

Rule 4(f) was inserted in the Rules doubtless so that in cases where the Court had jurisdiction and venue process

might issue to another District from that in which the corporate defendant might be domiciled or have its principal place of business. In view of the previous language used by this Court and the restriction on the issuance of process from one district to another, the Committee very probably doubted whether even in cases where jurisdiction and venue existed that by mere rule of Court in the absence of special permission of Congress process could issue from one district to another. It was not contemplated by the Committee that process would issue from one district to another where either venue or jurisdiction was absent, since such course would render the Rule out of harmony with Rule 82.

It is very true that this Court in the case of *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479, (January 13, 1941) sustained the validity of one of the Rules of Procedure and to that extent held that the Rules of Federal Procedure had the force and effect of a statutory enactment. This question was interestingly discussed in the case of *Richard* v. *Franklin County Distilling Co.*, (D. C. W. D. Ky.), 38 F. Supp. 513. In that case a resident of the State of Kentucky filed suit in the Western District thereof against a foreign corporation doing business only in the Eastern District of Kentucky. District Judge Miller held that since the foreign corporation was not doing business within the Western District of Kentucky process could not issue under Rule 4(f) to the Eastern District for service on the defendant. The Court specifically called attention to the fact that Rule 4(f) and Rule 82 must be read together, and said:

> "Plaintiff claims that jurisdiction is thus acquired under Rule 4(f) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, which provides 'all process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a

statute of the United States so provides, beyond the territorial limits of that state.' Before the enactment of that rule it was well settled that in the absence of a federal statute service of process outside of the District was void. Toland v. Sprague, 12 Pet. 300, 9 L. Ed. 1093; Munter v. Weil Corset Co., 261 U. S. 276, 43 S. Ct. 347, 67 L. Ed. 652; Robertson v. Railroad Labor Board, 268 U. S. 619, 45 S. Ct. 621, 69 L. Ed. 1119; Employers Reinsurance Corp. v. Bryant, 299 U. S. 374, 57 S. Ct. 273, 81 L. Ed. 289. If Rule 4(f) stood by itself it would seem clear that process served in the Eastern District would now be valid. But Rule 4(f) must be considered in conjunction with Rule 82, 28 U. S. C. A. following section 723c, which provides 'these rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein.' The joint effect of these two rules was considered by this court in Carby v. Greco, 31 F. Supp. 251, in which it was held that jurisdiction was not obtained over a defendant served in the Eastern District in an action instituted in the Western District. Reference is made to the opinion in that case for a more detailed discussion of the reasons for the conclusion reached."

It is very true that Your Honors approved Rule 4(f), but the Court also approved Rule 82 at the same time without any such interpretative addition as the Circuit Court of Appeals has made in this case. Rule 82 says that neither jurisdiction nor venue shall be diminished or enlarged by any of the rules. The Circuit Court of Appeals in this case has inserted an interpretative amendment to Rule 82 providing that personal jurisdiction may be obtained over the defendant beyond the limits of the district in which suit is filed.

This holding is contrary to the express provisions of Sections 112, 113, Title 28, U. S. C. A., and in direct conflict with Rule 82 of the Rules of Civil Procedure. No

held in Bath County v. Amy, 13 Wall. at page 250, 20 L. Ed. 539, that:

"'It was a process act, designed only to regulate proceedings in the federal courts after they had obtained jurisdiction; not to enlarge their jurisdiction. • • • It is quite too much to infer from this (statute) an enlargement of jurisdiction, or an adoption of all the powers of the state courts.'

"Section 914 must be construed in the same manner.

"It may be further noted, as a necessary, if somewhat astonishing, result of the argument for the plaintiff in error, that the construction of the statute contended for would enable the District Court, by intrusting a summons to a private person, instead of to the marshal, to enlarge its jurisdiction to the limits of a state which contains four districts. By section 787, Rev. St. U. S. (Comp. St. 1913, Sec. 1311), the marshal is empowered only to 'execute throughout the district all lawful precepts directed to him and issued under the authority of the United States.' Obviously, therefore, the marshal of the Eastern district can serve no summons within the Southern district; and it is certain that no law exists giving to a private person an authority in this regard which the marshal does not possess."

Note 1 to the foregoing (page 423) will be found in the following language:

"This is the definition of 'practice' in Bouvier's Law Dictionary, which in Kring v. Missouri, 107 U. S. 231, 2 Sup. Ct. 443, 27 L. Ed. 506, is said to be 'the best work of the kind in this country.'"

The service of summons is merely practice or procedure, but the filing of a suit against a defendant at a place prescribed by law is a substantive right of which the defendant may not be deprived over objection.

In *Carby* v. *Greco* (D. C. Ky.), 31 Fed. Supp. 251, 254, the Court uses the following language:

> "Congress, of course, has the power to enlarge the jurisdiction of the District Court by statute, and make such service valid in a case of this kind. But it has not done so. The statute authorizing the adoption of the New Rules specifically refrains from doing so. Title 28 U. S. C. A. Sec. 723b. Rule 82 itself embodies this statutory restriction. In construing the rules it must be kept in mind that the method of serving a summons is procedural; the effect of such service when made is jurisdictional. Sewchulis v. Lehigh Valley Coal Co., 2 Cir., 233 F. 422; Keller v. American Sales Book Co., D. C., 16 F. Supp. 189. In the present case the effect of holding the service valid under Rule 4(f) is to obtain jurisdiction over the defendants, where jurisdiction did not exist except for the rule. Such a construction is unauthorized under Rule 82."

In *Melekov* v. *Collins* (D. C. Cal.), 30 F. Supp. 159, it was held that such a construction of the rule had the effect of extending the jurisdiction of the Court and was, therefore, unauthorized.

Point III

No authoritative case is cited sustaining the rule adopted by the Circuit Court of Appeals in this case.

The Circuit Court of Appeals cites no case sustaining its conclusion. There is cited *McCormick Harvesting Machine Co.* v. *Walthers*, 134 U. S. 41, 33 L. Ed. 833. There a citizen of Nebraska sued the appellant, a foreign corporation, in the Nebraska District of the Federal Court of the State where it was carrying on business. The plaintiff was a resident of the district and the foreign corporation was present within the jurisdiction of the Court.

In the case of *Munter* v. *Weil Corset Co.*, 261 U. S. 276, 67 L. Ed. 652, a citizen of Connecticut sued a citizen of New

approval of an erroneous construction of Rule 4(f) could be inferred merely because this Court approved the Rules in their entirety. *United States* v. *Sherwood*, 312 U. S. 584, 85 L. Ed. 1058, 1063. There suit was brought in the United States District Court against the United States on a contract of Kaiser. The Supreme Court of New York made an order authorizing the bringing of the suit. The jurisdiction of the United States District Court to entertain the suit was questioned and this Court held that the Rules of Civil Procedure could not be used to abridge or enlarge the substantive rights of litigants or to diminish or enlarge the jurisdiction of federal courts. The Court used the following language:

> "This conclusion presupposes that the United States, either by the rules of practice or by the Tucker Act or both, has given its consent to be sued in litigations in which issues between the plaintiff and third persons are to be adjudicated. But we think that nothing in the new rules of civil practice so far as they may be applicable in suits brought in district courts under the Tucker Act authorizes the maintenance of any suit against the United States to which it has not otherwise consented. An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction and the Act of June 19, 1934, 48 Stat. at L. 1064, chap. 651, 28 U. S. C. A. Sec. 723b, authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts."

A similar question was presented, *Holiday* v. *Johnston*, 313 U. S. 342, 85 L. Ed. 1392, 1398. In that case it appeared that in a suit for habeas corpus the United States District Judge in California had appointed a master to make a finding of facts. Such course was according to a

long-prevailing practice in the State of California, which it is claimed had by implication received the approval of this Court. The Court held that the mere fact that such practice had appeared in cases before the Court and had been passed without notice did not justify the conclusion that the practice was proper, and further held that a mere rule of court could not overcome the plain provisions of a federal statute. The Court used the following language:

> "The circumstance that the practice has grown up of referring such causes to a commissioner, has long been indulged in in the federal courts of California, and has found a place in a rule of court, cannot overcome the plain command of the statute. It is true that the practice was followed in certain deportation cases which were reviewed by this Court but, so far as appears, no point was made as to the procedure followed in those cases and the matter was passed without notice.
>
> "It may be that the practice is a convenient one but, if so, that consideration is for Congress. In view of the plain terms in which the congressional policy is evidenced in the habeas corpus act, the courts may not substitute another more convenient mode of trial."

In exceptional instances Congress has fixed venue in one district and provided for the issuance of process to another district where the defendant might be served. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 47 Sup. Ct. 400, 71 L. Ed. 684, affirming 5 Cir., (1923), 295 Fed. 98, Cert. Denied 1924, 44 S. Ct. 453, 264 U. S. 597, 68 L. Ed. 868; *Robertson* v. *Railroad Labor Board*, 45 S. Ct. 621, 268 U. S. 619, 69 L. Ed. 1119, reversing *Railroad Labor Board* v. *Robertson*, 3 Fed. (2d) 488. But the able body of lawyers who comprised the Advisory Committee were confronted with the fact that seldom in the history of this country had Congress ever authorized process to be issued from one district to another without

a special act, only in one instance. This course was taken by Congress in the Credit Mobilier Act of March 3, 1873 (45 U. S. C. A. Secs. 81, 88) where such power might be exercised at the instance of the Attorney General under circumstances provided in the statute. Under similar circumstances, but for a limited period of three years, authority was granted by the Act of Congress, September 19, 1922 (28 U. S. C. A. Sec. 112), for the issuance of process upon a defendant in any district. See *United States* v. *Alaska Packers Assn.* (C. C. A. D. C.), 30 Fed. (2d) 564, *supra.*

Very naturally lawyers of the ability of Mr. Mitchell and other members of the Committee doubted, even where jurisdiction and venue were present that a provision could be made for the issuance of process from one district to another without a special Act of Congress. Judge Clark makes it perfectly clear, however, in his statement that such right could only be exercised when jurisdiction and venue were both present.

It was held in the foregoing case that the attention of the Court had not been directed to any Act where such power had been conferred where a private citizen was a defendant and where the plaintiff was at liberty to commence the suit in the district in which defendant was an inhabitant. The rule was intended to correct the inconveniences arising from the rule announced, *Employers Reinsurance Corp.* v. *Bryant, supra,* and other similar cases. The rule was never intended to apply unless venue and jurisdiction were both present.

Substantive Rights of a Defendant

This Court, in *United States* v. *Sherwood, supra,* held that no rule of Civil Procedure gave authority to modify or abridge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts, that is to say,

no Rule of Civil Procedure may do either. We have pointed out to the Court that the decision of the Circuit Court of Appeals in this case did enlarge the territorial jurisdiction of the Court. By reason of Rule 4(f) the Court held that the District Court for the Northern District of Mississippi had obtained personal jurisdiction over the petitioner and defendant which it would not otherwise have had but for the rule. Therefore, it is perfectly clear that the Circuit Court of Appeals in the instant case has enlarged the jurisdiction and venue of the Court.

But we also desire to point out to the Court that under such a construction Rule 4(f) would be in conflict with the Act of Congress and the order of this Court promulgating the rules. The Act of Congress, June 19, 1934, in respect thereto contained the following language:

> "Be it enacted * * * That the Supreme Court or the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect."

The order of the Court, date June 3, 1935, appointing the Advisory Committee for such purpose contained the following language:

> "It is ordered:
>
> "1. Pursuant to Section 2 of the Act of June 19, 1934, c. 651, 48 Stat. 1064, the Court will undertake the preparation of a unified system of general rules for cases in equity and actions at law in the District Courts of the United States and in the Supreme Court of the Dis-

trict of Columbia, so as to secure one form of civil action and procedure for both classes of cases, while maintaining inviolate the right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States and without altering substantive rights."

In *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479, there was presented to the Court for its consideration the validity of Rule 35, Rules of Civil Procedure, requiring a plaintiff to submit to physical and mental examination. In that case there was no question of venue or jurisdiction because the plaintiff had brought the suit and jurisdiction had been taken thereof. The question was as to whether or not the rule deprived the plaintiff of a substantive right. While the Court sustained the rule it pointed out that in order to bring any rule within the operation of the provision of the Act that the rule could not abridge, enlarge, or modify substantial right, and the Court held in that case that no such right was abridged or modified.

We not only claim in this case that Rule 4(f), as construed in the instant case, altered and modified venue and jurisdiction of district courts in violation of Rule 82, but that a substantive right of the petitioner was likewise invaded, that is to say, that the place where a suit may be brought is a valuable right. The place where a suit may be brought is provided by the Act of Congress and may not be provided otherwise. The State of Mississippi having two federal districts, according to the express provisions of Section 113, U. S. C. A., Title 28, the suit could only be brought in a district whereof the defendant was an inhabitant, as enlarged, however, in the *Neirbo case*, where it is held that a foreign corporation coming into a state and appointing an agent for service of process, consents that it may be sued in the district in which it transacts business; that is to say, the petitioner had a right of immunity from

suit in this, a transitory action, except in the district wherein it had consented to be sued in Mississippi.

Addressing itself to that subject, in the case of *Trolio* v. *Nichols*, 133 So. 207, 160 Miss. 611, 617, the Court used the following language:

> "The right of a citizen to be sued in the county of his residence is a valuable right; it is a right of importance to him—it is not a technical right. Where an action is brought in a county where any one of several defendants resides, the county must be one where a material defendant resides; he must be a proper party—he must not be joined for the sole purpose of giving the court of that county jurisdiction. If he is not a material defendant, and is joined as such by the plaintiff for the fraudulent purpose of giving the court jurisdiction, the cause will be dismissed or transferred to the proper county. 40 Cyc. 97 (and cases in the notes) 15 C. J. 800, and case notes; Tchula Commercial Co. v. Jackson, 147 Miss. 296, 111 So. 874."

This rule necessarily appears in the case of *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 69 L. Ed. 1119, 1123. In that case the Railroad Labor Board, proceeding under Act of Congress, wished to examine the appellant. It accordingly gave him notice under the Act to appear in Chicago, Illinois, for examination. This he declined to do. In such case the Act provided that proceedings might be taken in any district court of the United States against the party. The appellant was a resident of the State of Iowa. Proceedings under the Act were instituted in Chicago, Illinois, and process was issued and served upon him requiring his appearance. Seasonable objection was made thereto and the Court held, under Section 51, Judicial Code, Section 112, Title 28, U. S. C. A., that the suit could only have been maintained against him at the place of his residence, using the following language:

"We are of opinion that by the phrase 'any district court of the United States' Congress meant any such court 'of competent jurisdiction.' The phrase 'any court' is frequently used in the Federal statutes, and has been interpreted under similar circumstances as meaning 'any court of competent jurisdiction.' • • • (Citing Cases.) By the general rule the jurisdiction of a district court in personam has been limited to the district of which the defendant is an inhabitant, or in which he can be found. It would be an extraordinary thing if, while guarding so carefully all departure from the general rule, Congress had conferred the exceptional power here invoked upon a board whose functions are purely advisory (Pennsylvania R. Co. v. United States R. Labor Bd. 261 U. S. 72, 67 L. ed. 536, 43 Sup. Ct. Rep. 278; Pennsylvania R. System v. Pennsylvania R. Co. March 2, 1925 (267 U. S. 203, ante, 574, 45 Sup. Ct. Rep. 307).), and which enters the district court, not to enforce a substantive right, but in an auxiliary proceeding to secure evidence from one who may be a stranger to the matter with which the board is dealing. We think it has made no such extension by Section 310 of Transportation Act of 1920. It is not lightly to be assumed that Congress intended to depart from a long-established policy. Panama R. Co. v. Johnson, 264 U. S. 375, 384, 68 L. ed. 748, 751, 44 Sup. Ct. Rep. 391; Re East River Towing Co., 266 U. S. 355, 367, ante, 324, 327, 45 Sup. Ct. Rep. 114."

In *Employers Reinsurance Co.* v. *Bryant*, 299 U. S. 374, 81 L. Ed. 289, *supra*, this Court said:

"In this instance the dispute or controversy was not properly within the jurisdiction of the district court unless (1) the parties were citizens of different States; (2) the value or amount involved exceeded $3,000, exclusive of interest and costs; and (3) the defendant was before the court by reason of a general appearance or a valid service of process. Each of these elements of jurisdiction was essential, and if any was wanting

there was an absence of proper jurisdiction. The defendant was not before the court, and therefore it was without jurisdiction to proceed with the suit. Counsel for the petitioner assume that the presence of the defendant was not an element of the court's jurisdiction as a federal court; but the assumption is a mistaken one."

Sewchulis v. *Lehigh Valley Coal Co.*, 2 Cir., 233 Fed. 422. In that case the appellant filed suit in the Eastern District of New York against the appellee, a foreign corporation, doing business only in the Southern District thereof. Asserting that the Conformity Act applied, the plaintiff procured authority, under the Act of the State of New York, for the appointment of a private individual to serve process upon the appellee, defendant, in the Southern District of New York. The Court, speaking through Judge Hough, calls attention to the difference between the service of process and the effect of such service, using the following language:

"But there is a wide difference between the method of serving a summons and the effect of such service when made. The first relates to the 'form, manner, and order of conducting and carrying on suits.' The effect of the formal act called 'service' is not a question of practice at all, but one of jurisdiction, and jurisdiction in turn must be tested by substantive law. The portion of the Revised Statutes under consideration is the successor of the Act of Congress of May 19, 1828, c. 68, Sec. 1, 4 Stat. 278, which declared that 'the forms of mesne process * * * and the forms and modes of proceedings in suits in (certain) courts of the United States * * * shall be the same * * * as are now used in the highest court of original and general jurisdiction of the' states in which the federal courts are situated. In respect of this statute it was

York in the United States District Court of Connecticut, had the process issued to New York for service and the Court held that there was an absence of jurisdiction.

In the case of *Seaboard Rice Milling Co.* v. *C., R. I. & P. R. Co.*, 270 U. S. 363, 70 L. Ed. 633, a citizen of Texas sued a foreign railroad corporation in the United States District Court of Missouri. The Court held that the Railway Company could only be sued by a non-resident of the State of Missouri at the place of its domicile.

In the case of *Massachusetts Bonding & Ins. Co.* v. *Concrete Steel Bridge Co.*, 4 Cir., 37 Fed. (2d) 695, the appellant, Bonding Company, transacted business throughout the entire state of West Virginia. It was sued in the Northern District of West Virginia on a cause of action arising in such district. Its agent for service of process, however, resided in the Southern District of West Virginia. The appellant was present within the territorial jurisdiction of the district where the suit was brought and where the cause of action arose. It was immaterial that the service of process was had on its agent for service of process in the Southern District. Since the defendant was within the territorial jurisdiction of the Court it was proper under Rule 4(f) that process issue to the Southern District of West Virginia for service on the agent.

The case of *Schwarz* v. *Artcraft Silk Hosiery Mills*, 2 Cir., 110 Fed. (2d) 465, is not at all in point. In that case a resident of New York sued two defendants in the United States District Court for the Southern District of New York, one a foreign corporation doing business within the territorial jurisdiction of the Court, the other an individual. The Court held that under Rule 4 (f) it was proper that process issue to another district in New York for the individual defendant since the Court had obtained jurisdiction over the corporate defendant which was present within the

jurisdiction of the Court and was making no objection thereby. As a matter of fact, the case turned upon the point as to whether or not the individual defendant was fraudulently lured within the jurisdiction.

In the case of *Williams* v. *James* (D. C. La.), 34 Fed. Supp. 61, suit was brought by a non-resident of the State of Louisiana in the Western District thereof against a non-resident of the State transacting business in the Western District and an insurance corporation transacting business throughout the entire state and, therefore, was within the territorial jurisdiction of the Court. Each of the defendants had appointed an agent for service of process residing in the Eastern District of Louisiana, and the Court held very properly that process might issue from the Western District of Louisiana to the Eastern District. The Court further laid emphasis on the fact that each of the defendants under the Louisiana statute was suable in the Parish where the cause of action accrued, which was within the Western District of the State of Louisiana and the Court held that each of the defendants had contracted with the State of Louisiana and consented to be sued in that particular district.

In the case of *Coastal Club* v. *Shell Oil Co.*, 45 Fed. Supp. 859, a suit was brought in the Western District of Louisiana by a resident of the district against the Shell Oil Company, a foreign corporation actually engaged in transacting business in the Western District of the State within the jurisdiction of the Court. Its agent for service of process, however, resided in the Eastern District, and the Court held very properly that process might issue to the Eastern District for service.

In this case there is a constant confusion. In this case there is a failure to draw a distinction between the place for service of process and the place where a suit must be

filed. The proper rule is that the Court having jurisdiction and the venue being properly laid under Rule 4(f), process may issue to any part of the State for service.

In the case of *Andrews* v. *Joseph Cohen & Sons*, 45 Fed. Supp. 732, it was held that a foreign corporation doing business in the Southern District of the State of Texas, where the cause of action accrued, could only be sued in such district.

The Circuit Court of Appeals in this case based its decision largely upon the authority of *O'Leary* v. *Loftin*, D. C. N. Y., 3 F. R. D., page 36. In that case the plaintiffs were residents of the Eastern District of New York, were injured, so it was alleged, through the negligence of a foreign corporation domiciled in the State of Florida having an office and place of business in the Southern District of New York, but not in the Eastern District thereof. Process was issued from the Eastern District of New York to the Southern District and there served upon the defendant and its Trustees. The defendants took proper steps to object to the territorial jurisdiction sought to be obtained by motion. The District Judge overruled the motion of the defendants and held that under Rule 4(f) process might issue from the Eastern District of the State of New York for service upon a foreign corporation and its Trustees not transacting business therein to be served in the Southern District thereof.

This case stands alone and is contrary to every reported case dealing with the subject matter. The District Judge stated that the decisions of District Judges outside of the City of New York were to the contrary and that it was with great hesitation that he reached the conclusion had. He was of the opinion, however, that two cases from District Judges in the City of New York supported his conclusion. *Swerling* v. *New York & Cuba Mail S. S. Co.*, D. C. N. Y., 33 Fed. Supp. 721. The opinion in that case does not sup-

port the conclusion reached. There was a suit filed by a resident of the Eastern District of New York against a foreign corporation doing business only in the Southern District of the State. Process issued from the Eastern to the Southern District and was there served upon the defendant. The latter did not appear and object to the jurisdiction. The District Judge held contrary to the case of *O'Leary* v. *Loftin*, that the case should have been filed in the Southern District of New York, but the defendant having made no objection the jurisdiction was waived. The Court used the following language:

> "The summons and complaint were served at the defendant's principal place of business in the Southern District of New York. The action should have been brought in that District. See, Peters v. Detroit & Cleveland Navigation Co., D. C., 24 F. 2d 454; Caceres v. United States Shipping Board E. F. Corp., D. C., 299 F. 968; Leon v. United States Shipping Board E. F. Corp., D. C., 286 F. 681.
>
> "The summons and complaint were served on March 30, 1940. The defendant has not appeared generally or answered. The defendant having defaulted has waived all defenses or objections to the complaint. Rule 12(h) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c. The defendant failed to object to venue. That objection is subject to waiver. See, Panama R. R. Co. v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748; Mannion v. United States Shipping Board E. F. Corp., 2 Cir., 9 F. 2d 894. Under Rule 12 the objection to venue is waived if it is not claimed before or upon entering a general appearance or answer."

Neither does the case of *Salvatori* v. *Miller Music, Inc., et al.*, 35 Fed. Supp. 845, support the conclusion reached by District Judge Inch. In that case suit was brought by a resident of the Eastern District of New York against Miller

v. *Prudential Ins. Co.*, 322 U. S. 408, 64 S. Ct. 1075, 88 L. Ed. 1356. The decision of the Circuit Court of Appeals is in conflict with the following applicable decisions from this Court: *District of Columbia* v. *Henry C. Murphy*, 314 U. S. 441, 86 L. Ed. 329; *Philadelphia R. Co.* v. *McKibbin*, 243 U. S. 264, 61 L. Ed. 710; *Gilbert* v. *David*, 235 U. S. 561, 59 L. Ed. 360.

In *Gilbert* v. *David, supra*, the Court had the identical question under consideration in this case, wherein the following rule was announced:

> "It is apparent from all the testimony that the plaintiff may have had, and probably did have, some floating intention of returning to Michigan after the determination of certain litigation and the disposition of his property in Connecticut, should he succeed in disposing of it for what he considered it worth. But, as we have seen, a floating intention of that kind was not enough to prevent the new place, under the circumstances shown, from becoming his domicil. It was his place of abode, which he had no present intention of changing; that is the essence of domicil."

Other authorities are:

In *Granite Trading Corp.* v. *Harris*, 80 Fed. (2d) 174 (4 Cir., 1935), in a suit which had been filed in the Federal Court for the Eastern District of North Carolina, at Wilson, it was held that the Federal Court was not without jurisdiction or grounds of diversity of citizenship in an action by a New York corporation where defendant had been living in North Carolina, his native state, for two years or more, with intention of remaining there for an indefinite period, and without fixed intention of returning to New York, state of his last domicile, to make his home there, notwithstanding his belief or desire that his legal domicile remain in New York.

Other cases are *Wright* v. *Schneider*, 32 Fed. 705 (C. C., E. D. Mo., 1887); *Pacific Ins. Co.* v. *Tompkins* (4 Cir., 1900),

101 Fed. 539; *Tudor* v. *Leslie* (D. C. Mass. 1940), 35 Fed. Supp. 969; *Causey* v. *Lockridge* (D. C., E. D., S. C., 1938), 22 Fed. Supp. 692; and *Prince* v. *New York Life Ins. Co.* (D. C. Mass., 1938), 24 Fed. Supp. 41.

The rule announced by this Court is in exact accord with the prevailing rule in Mississippi. *Bank of Cruger* v. *Hodge*, 189 Miss. 356, 198 So. 26; *Ritter* v. *Whitesides*, 179 Miss. 706, 176 So. 728; *McHenry* v. *State*, 119 Miss. 289, 80 So. 763; *Hattiesburg* v. *Mollers*, 118 Miss. 154, 79 So. 87; *Hairston* v. *Hairston*, 27 Miss. 704.

The respondent evinced no intention of returning to Calhoun County whatsoever other than that he had purchased a lot in the cemetery and expected to be buried there. To entitle the respondent to invoke the jurisdiction of this Court something more than a technical claim of residence was required.

As will appear from the foregoing authorities, the terms "resident" and "inhabitant", as used in the Federal statutes dealing with venue and jurisdiction are synonymous. The respondent was neither a resident nor inhabitant of the Northern District of Mississippi.

Summary

(1) The petitioner for purposes of venue and jurisdiction is an inhabitant and resident of the Southern District of Mississippi, where it maintains its principal and only place of business in the state, where it has consented to be sued, where its process agent resides and the cause of action accrued.

(2) Mississippi contains two federal districts, and under Section 113, U. S. C. A., Title 28, suit may be brought against petitioner when sued alone in a civil action, not local, only in the Southern District of Mississippi, in which district it has consented to be sued, and is for jurisdictional and venue purposes an inhabitant thereof.

inhabitant. The District Judge appears to have been greatly disturbed in that the plaintiffs, if not permitted to maintain their suits in the Eastern District of New York, would be obliged to sue in the State of Florida. Assuming that the foreign corporation, and it is a proper assumption, had appointed an agent for service of process in the State of New York it was only necessary that the plaintiffs file their suits in the Southern District of New York under the *Neirbo* case. Certainly the individual Trustees could have been sued there. In the present case there is no such hardship. The respondent would have the right to bring his suit to Jackson, Mississippi in the Southern District of Mississippi where the petitioner has consented to be sued, where it transacts its business, the cause of action accrued, and the plaintiff for twenty-five years has maintained a home, brought up a family, and carried on a gainful occupation.

Point IV

This suit could only be maintained in the District Court of the United States for the Southern District of Mississippi which embraced Hinds County, Mississippi, where the cause of action accrued.

Under the Mississippi statutes hereinbefore referred to, since the cause of action accrued in Hinds County, Mississippi, this suit could only be filed in a state court in such county and the Supreme Court of Mississippi in construing its own statute dealing with jurisdiction and venue held that by the appointment of a statutory agent for the service of process the petitioner assented to be sued only in the territorial jurisdiction which embraced the county in which the cause of action arose, the petitioner being engaged in business in no other county in the state. *Forman* v. *Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. (2d) 344.

In the case of *Cohen et al.* v. *American Window Glass Co.*, 126 Fed. (2d) 111, Judge Clark, speaking for the Court, used the following language:

> "This trend toward allowing state law to govern jurisdiction and venue over foreign corporations reached its furthest step in Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437, where a designation of agent under state law was a waiver of federal venue."

In the case of *Oklahoma Packing Co.* v. *Oklahoma Gas and Electric Co.*, 100 Fed. (2d) 770 (C. C. A. 10), the Court used the following language:

> "Here, the provisions of the Oklahoma Constitution and statutes respecting the admission of foreign corporations to do business in the state provided that such corporations may be sued in the county in which the cause of action arose. By complying with those provisions and obtaining a license to transact a local business in Oklahoma, the Delaware Company did more than appoint a statutory agent for service of process; it assented to be sued in any court, state or federal, whose territorial jurisdiction embraced the county in which the cause of action arose. The cause of action here sued on arose in Oklahoma County. The Western District of Oklahoma embraces that county and a regular term of the court is held at Oklahoma City in that county. We conclude that the Delaware Company, by complying with the provisions of Oklahoma law respecting the domestication of foreign corporations, waived its right to object to the venue of the court and consented to be sued in the District Court of the United States for the Western District of Oklahoma."

In the case of *Ward* v. *Studebaker Sales Corp.*, 113 Fed. (2d) 567 (C. C. A. 3), the Court held that a suit in the United States District Court by a nonresident was properly

Music, Inc., a corporation doing business in the Southern District of New York, and an individual officer and agent of the defendant corporation. It appears that the individual defendant was present in the Eastern District, but the corporate defendant was not. The Court held that the jurisdiction of the Court was not sought under Section 52 of the Judicial Code, but under the Copyright Law that the individual defendant was properly joined; that the corporate defendant was not so properly joined, and the cause dismissed as to it. The Court used the following language:

> "As this action arises solely under the Copyright Law, the venue is controlled by that law, 17 U. S. C. A., and not determined by the provisions of the Judiciary Act, which apply to other suits in the District Courts. Lumiere v. Mae Edna Wilder, Inc., 261 U. S. 174, 176, 43 S. Ct. 312, 67 L. Ed. 596.
>
> "Section 35 of the Copyright Law reads as follows: 'That civil actions, suits, or proceedings arising under this title may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found.'
>
> "This action at bar was not properly brought against the defendant, Miller Music, Inc., in this district.
>
> "The defendant, Miller Music, Inc., is not rendered subject to suit in this district merely by the joining of A. I. Namm & Sons alleged an inhabitant of this district as a defendant.
>
> "As I have hereinbefore pointed out, the venue of this action is controlled by Section 35 of the Copyright Law, supra, and not by Section 52 of the Judicial Code, supra, and this is analogous to the rule in patent cases. Section 48 of the Judicial Code (Title 28, Section 109, U. S. C., 28 U. S. C. A. Section 109) and the following decisions in patent cases sustain my conclusion. Motoshaver, Inc., et al. v. Schick Dry Shaver, Inc., et al., 9 Cir., 100 F. 2d 236; Cheatham Electric Switching Device Co. v. Transit Development Co. et al., C. C., 191 F. 727, 732."

Therefore, it is perfectly apparent that the last mentioned case did not in any manner support the conclusions reached by District Judge Inch. The District Judge seeks to justify his conclusions by the case of *Schwarz* v. *Artcraft Silk Hosiery Mills*, 110 F. 2d 465, but overlooks the fact that in that case the plaintiff, a resident of the Southern District of New York, joined a foreign corporation doing business in the Southern District of New York where such corporation was properly served therein with an individual served with process under Rule 4(f) in a separate district of the State. This case in no manner supports the conclusion reached. Where there is more than one district in the state and more than one defendant process may properly issue to another district to bring in the defendant residing in another district. District Judge Inch used the following language:

> "As the plaintiffs reside in the Eastern District of New York and the defendants are residents of the State of Florida, the sole jurisdiction of this court over the suit rests on this above mentioned, diversity of citizenship. Judicial Code, Section 24, 28 U. S. C. A. Section 41.
>
> "The venue of this suit is limited to either the district where the plaintiff resides or the state where the defendants reside. Judicial Code, Sect. 51, 28 U.S.C.A. Section 112."

But the District Judge overlooked that the provision in the venue statute providing that the provision in Section 51, Judicial Code, Section 112, U. S. C. A., Title 28, providing that suit must be brought either in the district where the plaintiff resided or the defendant resided, did not enlarge but restricted jurisdiction. There are two federal Districts in the State of New York, and both under Sections 112 and 113 the suit was expressly required to be brought in the district of which the defendant was a resident or

filed in the district which embraced the County, under the state statute, wherein the cause of action accrued. Other cases are *Dehne* v. *Hillman Inv. Co.*, 110 Fed. (2d) 456 (C. C. A. 3); *North Butte Mining Co.* v. *Tripp*, 128 Fed. (2d) 588 (C. C. A. 9); *Atchison, T. & S. F. Ry. Co.* v. *Drayton* (8th Circuit), 292 Fed. 15; *Birdwell* v. *Indemnity Ins. Co.* (D. C. S. D. Texas), 48 Fed. Supp. 950. We presented this view to the Court of Appeals to which the Court replied that neither Federal jurisdiction nor venue could be effected by a state statute. We merely intended, however, to present the view that if a state statute providing that a cause of action should be brought in a certain county that the appointment of an agent for the service of process limited the authority of such agent to accept service except as to a suit filed within the territorial jurisdiction provided by the state statute and that a suit in the District Court of the United States should be filed in the district which embraced the county where the suit was required to be filed under the state statute. All of the elements of Federal venue and jurisdiction should be present. Under the state statute this suit could only be filed in Hinds County, Mississippi, where the cause of action accrued, and the petitioner was engaged in business, where the evidence would necessarily be found and the respondent himself had maintained a home for twenty-five years.

POINT V.

The respondent was not a resident of the Northern District of Mississippi but resided in the Southern District of Mississippi.

The proof established that the respondent came to Jackson, Mississippi, in 1924, acquired a home near the City of Jackson in which he and his family have continuously resided. He became a member of the local branch of his religious denomination, and has continually engaged in

one or more gainful occupations, which he is following at the present time; that he still owns a very small house or residence in Calhoun County, and that respondent, without his family, spends one or two nights per annum there: Affidavit, Mrs. Marietta Bishop (R. 18); affidavit of Walter G. Johnson (R. 21); affidavit of N. R. Lamar R. 26). Respondent made claim for homestead exemption covering his home in Jackson, Mississippi, stating that he was a resident of Hinds County, Mississippi (R. 9), covering several years (R. 9, 11, 13, 15). It appeared from the foregoing affidavits that the respondent did not claim a homestead exemption from taxation on his Calhoun County property, which he would be entitled to if he occupied the same as a homestead. Respondent had no business connection or interest of any kind in Calhoun County, in the Northern District of Mississippi. The facts contained in petitioner's affidavits were not denied.

Respondent filed a counter affidavit (R. 29), in which he conceded that for over twenty years he resided with his family in the City of Jackson, Mississippi. He expressed no intention of any kind of returning to Calhoun County in the Northern District of Mississippi. It did appear from the affidavits to which we refer that he held the office of Lieutenant-Governor for three terms, from 1924 to 1944, but that there were several years in the interval when he was not Lieutenant-Governor of Mississippi, and his duties as Lieutenant-Governor only required his presence in Jackson during the meetings of the legislature, which took place every two years and continued for not over four months.

Respondent went out of office January 1, 1944 and has never evinced any intention of returning to Calhoun County.

Upon objections to jurisdiction, the Court will examine the record for itself. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967; *Crites, Inc.*

(3) Rule 4(f) and Rule 82, Rules of Civil Procedure, must be construed together. Without Rule 4(f) it would be conceded that this suit could not be maintained in the Northern District of Mississippi, from which it necessarily follows that the territorial venue of the United States District Court for the Northern District of Mississippi is extended by the rule announced by the United States Circuit Court of Appeals in this case.

(4) Rule 4(f), Rules of Civil Procedure, for use in the United States District Courts, could not be used to obtain personal jurisdiction in the United States District Court for the Northern District of Mississippi, over petitioner, a foreign corporation which never transacted business at any time within the district, but is an inhabitant and resident of the Southern District of Mississippi.

(5) Rule 4(f), Rules of Civil Procedure, for use in the District Courts of the United States, may not enlarge or abridge the territorial jurisdiction or venue of actions provided in Section 112 and Section 113, U. S. C. A., Title 28.

(6) The mere fact that the committee having in charge the formulation of Rules of Civil Procedure, for use in the District Courts of the United States, expressed doubt as to whether Rule 4(f) would permit the issuance of process from one district to be served in another unless specially authorized by Congress, affords no basis for the conclusion reached in this case, since such rule was only intended to apply where territorial jurisdiction was present and venue properly laid.

(7) The committee having in charge the promulgation of the Rules of Civil Procedure was confronted with the fact that in states having more than one district the agent for service of process for a foreign corporation usually being located at the seat of the State Government, might

reside in a different district from the district wherein the foreign corporation maintained its principal office and place of business, and was an inhabitant and resident and under such circumstances the foreign corporation being within the territorial limits of the district where the suit was filed, it was appropriate that under Rule 4(f) process issue to the district wherein the agent for service of process might be served.

(8) The committee having in charge the promulgation of the Rules of Civil Procedure were confronted with the rule that process could not issue from one district to another except by special permission of Congress, which has only been granted in exceptional cases, and, therefore, may have entertained some doubt where even venue and jurisdiction were present whether the issuance of such process could be authorized by a mere rule.

(9) This Court in approving Rule 4(f) at the same time approved Rule 82.

(10) Service of process and personal jurisdiction are separate and distinct and should not be confused. Personal jurisdiction may not be obtained over a foreign corporation in a civil action when sued alone, except and unless it is present within the territorial limits of the district where the suit is filed. If it is present, however, it is immaterial whether the agent for service of process may be found in the district or not.

(11) The respondent, according to the undisputed facts, was a citizen and resident of the Southern District of Mississippi where he maintained his home and transacted his business. He did not have even a fleeting intention of taking up his residence in the Northern District of Mississippi.

The petitioner respectfully submits that the decision of the United States Circuit Court of Appeals, Fifth Circuit, should be reversed and the decision of the District Judge affirmed.

Respectfully submitted,

WILLIAM H. WATKINS,
P. H. EAGER, JR.,
RALPH B. AVERY,
MRS. ELIZABETH HULEN,
Jackson, Mississippi,
Attorneys for Petitioner.

E. C. BREWER,
Clarksdale, Mississippi,
Of Counsel.

I, William H. Watkins, of counsel for petitioner in the above entitled cause, certify that I have this day handed to H. H. Creekmore and Rufus Creekmore, Attorneys for Respondent in the above entitled cause, in person, a true and correct copy of the foregoing brief.

This, the 22nd day of October, 1945.

WILLIAM H. WATKINS,
Of Counsel.

APPENDIX "A"

(Opinion of District Judge—Filed December 5, 1944)

The plaintiff in this cause is a resident citizen of the Northern District of Mississippi. The defendant is a non-resident corporation which does no business in the Northern District of Mississippi; but which engages in business in the Southern District of Mississippi and which in obedience to the Mississippi law has designated an agent for service of process who resides in Jackson, Mississippi in the Southern District of Mississippi. The cause of action alleged in the declaration arose in the Southern District of Mississippi. Process was served on defendant in the Southern District of Mississippi by virtue of Sec. F, of Rule 4 of the Rules of Civil Procedure.

In the Court's judgment the Rules of Civil Procedure have not in any way enlarged either the jurisdiction or venue of the District Court.

As I read the opinion of the Supreme Court of the United States in Neirbo Co. vs. Bethlehem Corporation—308 U. S. 167, what the Court holds is in substance that for purposes of jurisdiction the Court will still recognize the legal fiction of citizenship of a corporation in the State of its incorporation; but that for purposes of venue it will adopt the practical and realistic view that such corporations are domiciled in any District where they do business and have in accordance with the mandates of State law appointed agents for the service of process.

If this be the correct view of the holding in the Neirbo case it follows that under Section #113 of the Judicial Code the defendant in this case, is in that limited sense, an inhabitant of the State of Mississippi, and entitled to be sued in the District of the State where it resides.

It follows that there is not proper venue in the Northern District of Mississippi and the motion to dismiss for want of venue is sustained.

This holding is in line with St. Louis, S. W. Railroad vs. Alexander—227 U. S. 218—and in the Court's judgment presents a clear and workable application of, the Rules of

Civil Procedure and the rules of law as announced in the Neirbo and the St. Louis S. W. Railroad case above referred to.

This December 5, 1944.

ALLEN COX,
District Judge.

APPENDIX "B"

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11254

DENNIS MURPHREE, *Appellant,*

versus

MISSISSIPPI PUBLISHING CORPORATION, *Appellee*

Appeal from the District Court of the United States for the Northern District of Mississippi

(May 7, 1945)

Before Sibley, Hutcheson, and Lee, Circuit Judges.

LEE, *Circuit Judge:*

Appellant, alleging himself to be a resident citizen of Calhoun County in the Northern District of Mississippi, brought this suit in the United States District Court for said district against the appellee, a Delaware corporation duly qualified to engage in business in Mississippi, to recover damages alleged to have resulted from a libel published editorially in a newspaper of the appellee in the city of Jackson in the Southern District of Mississippi. Process was served in the Southern District upon appellee's resident agent for process by the marshal for that district. Appellee moved to dismiss, alleging that the court had no jurisdiction over the subject matter or of the person of

the defendant; that the venue was improperly laid; that the process was void under the law; and that the attempted service was insufficient.

The motion was tried on affidavits from which the court below found that appellant was a resident citizen of the Northern District of Mississippi; that the appellee was engaged in business in the Southern District of Mississippi, with its only office there, and, in obedience to the laws of Mississippi, had designated an agent for service of process who resided in the city of Jackson; that the cause of action alleged arose there; and that process on appellee was served in the Southern District by virtue of Section (f) of Rule 4 of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c. Thereupon, the court below, interpreting the opinion in the Neirbo case [1] to mean that for purposes of jurisdiction the Supreme Court will still recognize the legal fiction of citizenship of a corporation in the state of its incorporation, but for purposes of venue it would adopt the practical and realistic view that such a corporation is domiciled in any district where it does business and has in accordance with the mandate of the state law appointed an agent for the service of process, concluded: "* * * it follows that under Section #113 of the Judicial Code, the defendant in this case, is in that limited sense, an inhabitant of the State of Mississippi, and entitled to be sued in the District of the State where it resides"; held "that there is not proper venue in the Northern District of Mississippi"; and dismissed the suit, without prejudice, for want of venue. This appeal followed. The sole question before us for determination is whether the District Court for the Northern District of Mississippi should have entertained the suit.

Since this is a civil suit between a citizen of Mississippi and a Delaware corporation and the amount in controversy exceeds $3,000, federal jurisdiction over the subject matter is present. Under Section 51 of the Judicial Code, 28 U. S. C. A., Sec. 112(a), where the jurisdiction is founded only on the fact that the action is between citizens of differ-

[1] *Neirbo Co. v. Bethlehem Shipbuilding Corporation*, 308 U. S. 165, 60 S. Ct. 153, 154, 84 L. Ed. 167, 128 A. L. R. 1437.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 234

MISSISSIPPI PUBLISHING CORPORATION,
Petitioner,

vs.

DENNIS MURPHREE,
Respondent

PETITIONER'S REPLY BRIEF

WILLIAM H. WATKINS,
P. H. EAGER, JR.,
RALPH B. AVERY,
MRS. ELIZABETH HULEN,
Jackson, Mississippi;
Attorneys for Petitioner.

E. C. BREWER,
Clarksdale, Mississippi,
Of Counsel

Point II

No jurisdiction over the person of the petitioner could be obtained through service on its process agent in the Southern District of Mississippi pur-

ent states, venue may be laid "in the district of the residence of either the plaintiff or the defendant." When laid, as here, at the residence of the plaintiff, the process from that court directed to the marshal of the Southern District and served by him upon the resident agent for service of process of the appellee in that district, conferred upon the court jurisdiction of the person of the appellee. Rule 4(f), Federal Rules of Civil Procedure.[2] The Neirbo case indicates nothing to the contrary. In fact the Supreme Court in that case seemed to recognize that the question before it would not have been raised had the suit been brought in the district of the residence of the plaintiff or that of the defendant. In the very beginning of the opinion, Mr. Justice Frankfurter said:

> "The suit was based on diversity of citizenship and was not brought 'in the district of the residence of either the plaintiff or the defendant.'"

And no language in the opinion which follows disturbed or modified the lower court's holding that "had plaintiffs been residents of the Southern District of New York, so that venue was properly laid, service of process upon the defendant would have been had by service upon its agent."[3] The rationale of the opinion in the Neirbo case is that a foreign corporation, by the appointment of an agent for the service of process in accordance with the laws of the state in which the corporation is doing business, waives the provisions of the venue statute which otherwise it would be entitled to assert; by such act it affirmatively consents to be sued in the courts in that state, state and federal. Prior to the Neirbo case the courts generally had held that such an appointment did not constitute a waiver by a corporation of its right to be sued in the district of which it was an inhabitant;[4] but even when so holding,

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[2] Moore's Federal Practice, Vol. I, p. 360, et seq.; Hughes, Federal Practice and Procedure, Vol. 17, Secs. 18,992 to 18,994, incl.; *Schwarz* v. *Artcraft Silk Hosiery Mills*, 2 Cir., 110 F. 2d 465; *O'Leary* v. *Lofton*, D. C., 3 F. R. D. 36.

[3] *Neirbro* v. *Bethlehem Shipbuilding Co.*, 2 Cir., 103 F. 2d 765, 770.

[4] See cases cited in 2 Cir., 103 F. 2d 765.

the courts recognized the right of a plaintiff in diversity of citizenship cases to subject a corporate defendant to suit in a federal court of the district of which the plaintiff was a resident.[5]

Section 113, Title 28 U. S. C. A., relied on by the Court below does not conflict with but supplements Section 112 (a). Under Sections 112(a) and 113, where diversity of citizenship exists and suit is not brought in the district of the residence of the plaintiff but in the district of the residence of the defendant, and the defendant resides in a state containing more than one district, and the suit is not one of a local nature, then venue must be laid in that district of the state where the defendant resides.

More troublesome, perhaps, is the question whether the court of the Northern District could obtain jurisdiction over the person of the defendant by service of process outside the district. This question relates to the power of the Supreme Court to promulgate Rule 4(f) of the Federal Rules of Civil Procedure. While the rule affects neither venue nor jurisdiction over the subject matter, it does permit the court to acquire personal jurisdiction over a defendant in another district within the state in a case like the present —a power that did not exist prior to the adoption of the rules. As was pointed out in Moore's Federal Practice, Vol. 1, page 361, "Since the Advisory Committee specifically called the attention of the Supreme Court to the question of its power to promulgate this rule, it may be safely assumed that the Supreme Court, by promulgating the rule, has concluded that it has the power."

In this court appellee contends that the consent to be sued flowing from the appointment of an agent for service of process under state law is limited by the state venue statutes and this limitation governs the venue of the federal courts in the state; and appellee argues that as the Mississippi statute in fixing venue of suits in the state courts

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[5] *McCormick* v. *Walthers*, 134 U. S. 41, 10 S. Ct. 485, 33 L. Ed. 833; *Munter* v. *Weil Corset Co.*, 261 U. S. 276, 43 S. Ct. 347, 67 L. Ed. 652; *Seaboard Rice Milling Co.* v. *Chicago, R. I. & P. R. R. Co.*, 270 U. S. 363, 46 S. Ct. 247, 70 L. Ed. 633; *Massachusetts Bonding & Ins. Co.* v. *Concrete Steel Bridge Co.*, 4 Cir., 37 F. 2d 695.

fixes venue either in the district where the cause of action accrued or where the defendant had its principal place of business, venue in this case was improperly laid in the District Court for the Northern District of Mississippi, since the cause of action accrued in the Southern District of Mississippi and appellee had his principal place of business in that district. What the situation might be if there were no federal statute fixing venue is not before us. It is hornbook law that where a federal statute fixes the venue of the federal courts, state laws are inapplicable. Cf. Munter v. Weil Corset Co., 261 U. S. 276, 278, 43 S. Ct. 347, 67 L. Ed. 652.

Considerable space is devoted in the briefs to a consideration of the issue of fact with respect to the place of residence of the plaintiff. The finding of the court below on this issue is supported by substantial evidence—evidence which has convinced us that the lower court's finding on this issue is correct.

The judgment appealed from is reversed, and the cause is remanded for proceedings in accordance with the views herein expressed.

Reversed and Remanded.

A True copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

APPENDIX "C"

Section 5319, Mississippi 1942 Code, contains the following language:

> "Every foreign corporation doing business in the state of Mississippi, whether it has been domesticated or simply authorized to do business within the state of Mississippi, shall file a written power of attorney designating the secretary of state or in lieu thereof an agent as above provided in this section, upon whom service of process may be had in the event of any suit against said corporation; and any foreign corpora-

tion doing business in the state of Mississippi shall file such written power of attorney before it shall be domesticated or authorized to do business in this state, and the secretary of state shall be allowed such fees therefor as is (sic) herein provided for designating resident agents. Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state."

APPENDIX "D"

Section 1433, Mississippi 1942 Code:

"Venue of actions, what county generally—actions against public officer to be brought in county of his residence.—Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendants or any of them may be found, and if the defendant is a domestic corporation, in the county in which said corporation is domiciled, or in the county where the cause of action may occur or accrue except where otherwise provided, and except actions of trespass on land, ejectment, and actions for the statutory penalty for cutting and boxing trees and firing woods and actions for the actual value of trees cut which shall be brought in the county where the land or some part thereof, is situated; but if the land be in two or more counties, and the defendant resides in either of them, the action shall be brought in the county of his residence, and in such cases, process may be issued against the defendant to any other county. If a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence, or if a public officer be sued in any such action, out of the county of his household and residence, although a surety or sureties, or some of the sureties, on his bond, or other joint defendant, sued with him, be found or be subject to action in

such county, the venue shall be changed, on his application, before the jury is impaneled, to the county of his household and residence, whether such suit is filed before or after such officer's term of office has expired."

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Summary of Points

Point I

REPLY BRIEF
PETITIONER

brought by a non-resident of the district, the defendant, whether an individual or corporation, must be an inhabitant of and found within the district. In suits where the plaintiff is a resident of the district, the statute necessarily requires that the non-resident defendant, whether a corporation or an individual, either be present within the district or voluntarily appear. Otherwise, the section is meaningless because the court could obtain no territorial jurisdiction under this Section unless the non-resident defendant was within the district or voluntarily appeared.

The correctness of this position necessarily appears for the following reasons:

(a) *A Federal district a separate entity and the territorial jurisdiction thereof is limited by the boundaries of the district.*

There are two Federal judicial districts in Mississippi, the Northern and the Southern Districts. Congress has specifically defined the territorial boundaries of each of these districts. Section 51, therefore, in providing that at least the plaintiff or the defendant should be a resident of the district necessarily contemplated that the defendant, whether an individual or corporation, would be found within the district. That such defendant should be found within the district was just as essential to the territorial jurisdiction as that the plaintiff should be a resident of the district, unless such non-resident defendant voluntarily appeared.

In the case of *New York Trust Company* v. *Eisner*, 256 U. S. 345, 349, 65 L. Ed. 963, Justice Holmes uses the following language:

"A page of history is worth a volume of logic."

The position of respondent may not be reconciled, upon the other hand it is at variance, with the Congressional history

of the Judiciary Act from 1789 down to the present date. Neither is respondent's position supported by logic. While Mississippi has two Federal districts and venue in this case is fixed under Section 52, 113 U. S. C. A., since petitioner was sued alone in a territorial action it is essential that petitioner be present within the territory of the district.

In *Toland* v. *Sprague*, 12 Pet. 300, 9 L. Ed. 1093, this matter was discussed, the Court using the following language:

> "The Judiciary Act has divided the United States into judicial districts. Within these districts, a circuit court is required to be holden. The circuit court of each district sits within and for that district; and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court, to have run into any state of the Union. It has not done so. It has not, in terms, authorized any original civil process to run into any other district, with the single exception of subpoenas for witnesses, within a limited distance. In regard to final process, there are two cases, and two only, in which writs of execution can now by law be served in any other district than that in which the judgment was rendered—one in favor of private persons in another district of the same state; and the other in favor of the United States, in any part of the United States. We think that the opinion of the legislature is thus manifested to be that the process of a circuit court cannot be served without the district in which it is established, without the special authority of law therefor."

Again, in *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 622, 69 L. Ed. 1119 (1925), the court said:

> "Under the general provisions of law, a United States district court cannot issue process beyond the

limits of the district * * * and a defendant in a civil suit can be subjected to its jurisdiction in personam only by service within the district * * *. Such was the general rule established by the Judiciary Act of September 24, 1789, chap. 20, Sec. 11, 1 Stat. at L. 73, 79, Comp. Stat. Sec. 1033, in accordance with the practice at the common law * * *. And such has been the general rule ever since * * *. No distinction has been drawn between the case where the plaintiff is the Government and where he is a private citizen."

In *Primos Chemical Co.* v. *Fulton Steel Corporation* (D. C. N. D. N. Y.), 254 Fed. 454, 458, the court used the following language:

"These are limitations on the judicial power. Pursuant to the authority thus conferred, Congress has established in each of the states of the United States one or more judicial districts (Judicial Code (Act March 3, 1911, c. 231) c. 5, Secs. 69-115, 36 Stat. 1105-1130 (Comp. St. 1916, Secs. 1051-1106)) and has also divided the United States into Judicial circuits. The boundaries of these districts and circuits are defined. The Congress has also provided for the appointment of one or more District Judges in each of such judicial districts (chapter 1, Sec. 1, Judicial Code (Comp. St. 1916, Sec. 968)), and for the appointment of Circuit Judges in each of the judicial circuits. Each district judge must be an actual bona fide resident of the district in and for which appointed. The jurisdiction of each of these District Courts is coextensive with the boundaries of the judicial district in and for which it is established or created, and extends no further, except in those cases where the Congress has expressly extended it.

"The Judicial Code points out these cases. * * *

"'The circuit court (now District Court) of each judicial district sits within and for that district, and its jurisdiction as a general rule is bounded by its local limits.' Toland v. Sprague, 12 Pet. 300, 328 (9 L. Ed. 1093); Devoe Mfg. Co., Petitioner, 108 U. S. 401, 2 Sup.

Ct. 894, 27 L. Ed. 764; Barrett v. United States, 169 U. S. 218, 221, 18 Sup. Ct. 327, 42 L. Ed. 723."

In *Gutschalk* v. *Peck* (N. D. Ohio, W. D.), 261 Fed. 212, where a plaintiff residing in the district asserted the right to obtain process over a defendant in another state, District Judge Killits used the following language:

"Applying these criteria, we hold that the language depended upon from section 51 of the Judicial Code is not in fact an attempt to enlarge, from previous legislation, the court's jurisdiction over the person of a nonresident defendant, but it is a limitation thereof. Previous to 1888, when section 51 became the law, jurisdiction of an individual was given to a federal court of first instance in this language (Act March 3, 1875, c. 137, Sec. 1, 18 Stat. 470):

"'No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in *which he shall be found at the time of serving such process or commencing such proceeding*, except as hereinafter provided.'

"Comparing this language with that above quoted from the act of 1888 (Act Aug. 13, 1888, c. 866, Sec. 1, 25 Stat. 433 (Section 51, Judicial Code)), it will appear that the broad provision that a person might be proceeded against in a civil action in any district in which he might be found was repealed in the provision, in the new legislation, that 'no civil suit shall be brought in any District Court against any person by any original process of proceeding in any other district than that whereof he is an inhabitant; * * *' In writing this into section 51, Congress undoubtedly was protecting the individual against process wherever he might be. This language just quoted ends with a semicolon. The statute proceeds thereupon to a limitation of its effect to operate under certain circumstances, and so the statute says:

"'But where the jurisdiction is founded only on the fact that the action is between citizens of different

states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.'

"When we bear in mind that Congress is amending a statute which provided that the defendant might be sued in any district in which he is found, the meaning of this provision, it seems to us, is clear. By the old statute the plaintiff could begin an action in the district where he found the defendant, commanding for that purpose the power of the court to cause its own officers to summon the defendant, but this law, of course, compelled the plaintiff to go into the district in which he found his adversary to commence the action. The limitation in section 51 we are considering must, we think, be considered to be, pro tanto, a preservation, under the circumstance provided for, of the right accorded in the Act of 1875, and it should not be construed to give this court a kind of jurisdiction which was not provided for by the act of 1875."

A resident plaintiff in order to obtain territorial jurisdiction over a nonresident defendant must find his adversary within the territorial limits of the district. Counsel lays too much emphasis upon the exclusion of the words "found within the district" from the Acts of 1887-1888. The learned District Judge in the above mentioned case announces the correct rule that the exclusion of such language did not render it any less necessary that the nonresident defendant be found within the district. This opinion is in exact accord with the decision of this Court, *Neirbo v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 84 L. Ed. 167, where the Court, addressing itself to that identical question, used the following language:

"The notion that the 1887 amendment, by eliminating the right to sue a defendant in the district 'in which he shall be found,' was meant to affect the implications of a consent to be sued—implications which were the basis of the Schollenberger decision—derives from a misapplication of the purpose of Congress to contract

> diversity jurisdiction, based upon a misunderstanding of the legislative history of the 1887 amendment. The deletion of 'in which he shall be found' was not directed toward any change in the status of a corporate litigant. The restriction was designed to shut the door against service of process upon a natural person in any place where he might be caught. It confined suability, except with the defendant's consent, to the district of his physical habitation. In so far as the 1887 legislation sheds any light upon the status of a corporate litigant in diversity suits, its significance lies outside the omission of the 'he shall be found' clause."

It is not absolutely necessary that this Court shall determine that the petitioner is an inhabitant or resident of the Southern District of Mississippi. It is sufficient to say that it was not present within the Northern District, therefore such district had no territorial jurisdiction over the petitioner and the venue was improperly laid.

In *Ex Parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853, the Court used the following language:

> "It is unnecessary to inquire whether these several companies were inhabitants of the district. The requirements of the law, for all the purposes of this case, are satisfied if they were found there at the time of the commencement of the suits."

That is to say, the defendant was found within the district where the suit was brought, which is still necessary. The effect of the *Neirbo Case* was to place a foreign corporation doing business in the state, having appointed an agent for service of process, in the same status in respect to territorial jurisdiction as a domestic corporation would be. Its status is equivalent to that of an inhabitant or resident of the state of the district in which it transacts business. *Moss* v. *Atlantic Coast Line R. Co.*, 2 Cir., 149 Fed. 2d 701; *Schwarz* v. *Artcraft Silk Hosiery Mills*, 2 Cir., 110 Fed. 2d 465. It

has been definitely decided by this Court that a foreign corporation may only be sued by a resident of the state in the district in which it transacts business.

In our original brief, pages 22-24, we cited a large number of cases announcing the foregoing rule, one of the leading cases being *St. L. S. W. R. Co.* v. *Alexander*, 227 U. S. 218, 57 L. Ed. 486, 488. The same rule was announced, *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100, 42 L. Ed. 964.

In *Adair* v. *Employers' Reinsurance Corp.*, (D. C. Tex.), 10 F. Supp. 725, 726, the Court used the following language:

> "A foreign corporation cannot be sued in a national court save and except in that district in which it is conducting business. St. Louis Southwestern R. Co. v. Alexander, 227 U. S. 218, 222, 33 S. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77.
>
> "A civil suit purely in personam may not go forward against a defendant without either a voluntary appearance or the legal service of process at a place where the officer serving it has authority to do so. A United States District Court cannot issue process beyond the limits of its own district. A defendant cannot be subjected to its jurisdiction in personam by pretended service outside of the district. Robertson *v.* Railroad Labor Board, 268 U. S. 619, 45 S. Ct. 621, 69 L. Ed. 1119."

In *Moore Dry Goods Co.* v. *Commercial Ind. Co.*, 9 Cir. 282 Fed. 21, 24, the Court used the following language:

> "The general rule is that, to support the jurisdiction of a court of the United States to render a personal judgment against a foreign corporation, it is essential, in the absence of consent, that the corporation was, at the time of the service of process, doing business within the district in such a manner and to such an extent as to warrant the inference that through its agent it was found there, and service must be made

upon some agent so far representing the corporation that he may be held in law as an agent to receive process on behalf of his principal. People's Tobacco Co. *v.* Am. Tobacco Co., 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537; Toledo *v.* Hill, 244 U. S. 49, 37 Sup. Ct. 591, 61 L. Ed. 982; Phila. & Reading Ry. Co. *v.* McKibbin, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710; St. Louis Southwestern Ry. Co. *v.* Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77; International Harvester Co. *v.* Kentucky, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479; Green *v.* C., B. & Q. Ry. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; St. Clair *v.* Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; Chinn *v.* Foster-Milburn Co. (D. C.) 195 Fed. 158; Michigan Aluminum Foundry Co. *v.* Aluminum Castings Co. (C. C.) 190 Fed. 879; Ladd Metals Co. *v.* American Mining Co. (C. C.) 152 Fed. 1008; Frawley, Bundy & Wilcox *v.* Pennsylvania Casualty Co. (C. C.) 124 Fed. 259."

In *Rosenberg Bros. & Co.* v. *Curtis Brown Company*, 260 U. S. 516, 67 L. Ed. 372, the rule is reaffirmed that a corporation must be subject to service and found in the district in which the suit is brought.

It is the position of respondent's counsel that the Court merely decided that a foreign corporation could not be sued unless it was transacting business in the district, had reference only to the service of process. However, the Court has expressly announced that the foreign corporation must be present, transacting business within the district; that is to say, that the nonresident defendant must be within the territorial jurisdiction of the District Court. Otherwise, there is an absence of territorial jurisdiction and the venue is improperly laid.

Sections 51 and 52, 112 and 113, Title 28 U. S. C. A., since the decision of these cases, have been reenacted without change a number of times, from which it would neces-

cut corporation, filed suit in the United States District Court for the State of Connecticut against a resident citizen of the State of New York and had process issued and served upon the petitioner in the latter state. Objection was made by the petitioner to the jurisdiction over his person upon the ground that he was not present within the district, not served therein, but service was had in the State of New York. The court did say in that case that the petitioner could have no objection to the jurisdiction or venue. The court meant, however, that the petitioner could raise no objection to the jurisdiction because the amount involved exceeding $3,000.00, the subject matter was one over which the court had jurisdiction, and that the petitioner therefore could have no objection to the venue if he was present within the territorial limits of the jurisdiction or voluntarily appeared in the case. The determining question in the case was as to whether or not the petitioner through the pleadings filed by him and by his conduct entered a general appearance and therefore waived the lack of venue or territorial juridiction over him. The court held, however, that lack of personal jurisdiction over the petitioner was properly presented and not waived. The case is not an authority for the announcement of respondent's counsel that venue in the United States District Court is present whenever the plaintiff is a resident of the district where the suit is filed regardless of where the defendant may reside or be found.

In the case last above, the court cited *Lee* v. *Chesapeake & Ohio R. Co.*, 260 U. S. 653, 67 L. Ed. 443. In that case a non-resident of the State of Kentucky sued the Railroad Company, a non-resident of such state, in a state court in the State of Kentucky. The defendant, Railroad Company, removed the case to the United States District Court for the district wherein the suit was filed, and this Court held the question of venue was waived by the removal of the

case. The court in that case expressly overruled what is known as the *Wisner* case. The court also referred to the case of *Camp* v. *Gress*, 250 U. S. 308, 63 L. Ed. 997. In that case a non-resident of the State of North Carolina sued three defendants, two of whom were residents of the state, and one a resident of another state, though found within the district of the United States Court where the suit was filed. The court announced the rule that personal jurisdiction could not be obtained over a non-resident defendant unless such defendant was there found within the district or voluntarily appeared, using the following language:

> "Ordinarily jurisdiction could be obtained in the district of the plaintiff's residence only over nonresidents; because all of the defendants must be nonresidents in order to satisfy the requirement of diversity of citizenship. And as to these there can be personal jurisdiction only so far as found within or voluntarily appearing within the district."

The determining question in the case of *Munter* v. *Weil Corset Company, supra,* was as to whether or not the nonresident defendant therein had appeared. If so, jurisdiction and venue were present; otherwise the process was void.

This case involves the construction of Sections 112 and 113, U. S. C. A., Title 28, being Sections 51 and 52, Judicial Code. Section 51 deals with states having only one district and Section 51 is intended to provide where suits may be filed in the United States District Court in states having but one district. The construction of this statute may in no way be modified or influenced by Rule 4(f) of Rules of Civil Procedure or any other rule. The question is presented as to what was intended by Congress as to where the nonresident defendant might be found where suit was brought by a resident of the district. It is clear that if suit is

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 234

MISSISSIPPI PUBLISHING CORPORATION,
Petitioner,

vs.

DENNIS MURPHREE,
Respondent

PETITIONER'S REPLY BRIEF

POINT I

The District Court of the United States for the Northern District of Mississippi had no territorial jurisdiction over the petitioner and therefore the venue was improperly laid.

Respondent's counsel take the position that since the respondent was a citizen of the Northern District of Mississippi that the venue was properly laid and the court had territorial jurisdiction over the petitioner although it could not be found within the territorial limits of the district. Upon the other hand, it is the petitioner's position that although the respondent might be a citizen of the Northern District of Mississippi, no territorial jurisdiction could be obtained over the petitioner unless it was present within the territorial limits of the district.

Counsel rely upon *Munter* v. *Weil Corset Co.*, 261 U. S. 276, 67 L. Ed. 652. In that case the respondent, a Connecti-

sarily appear that the construction given to the statutes by the Court became part thereof. *Federal Communications Commission* v. *Columbia Broadcasting System*, 311 U. S. 132, 85 L. Ed. 87; *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, 87 L. Ed. 656; *Hecht* v. *Malley*, 265 U. S. 144, 68 L. Ed. 949; *United States* v. *Ryan*, 284 U. S. 167, 76 L. Ed. 224; *Johnson* v. *Manhattan Railway Co.*, 289 U. S. 479, 77 L. Ed. 1331; *Brewster* v. *Gage*, 280 U. S. 327, 74 L. Ed. 457.

(b) *If the decision of the United States Circuit Court of Appeals in this case be correct, then for the first time in its history Congress in fixing territorial jurisdiction neglected to provide for process to other districts.*

It is petitioner's position that in the passage of Section 51 as well as Section 52, Congress intended that the non-resident defendant should either be present in the district or voluntarily appear: otherwise, the Court would have no territorial jurisdiction over such defendant. It is the further position of petitioner that the territorial jurisdiction of the Court over a defendant may not be in any manner changed, enlarged, diminished, or modified by any rule of Civil Procedure. The question necessarily presents itself as to whether or not the District Court of the Northern District of Mississippi might have had territorial jurisdiction over the petitioner without Rule 4(f). It is conceded in this case that no such territorial jurisdiction was had or could be obtained; in other words, that without Rule 4(f) the Court had no territorial jurisdiction of such defendant.

The United States Circuit Court of Appeals in this case said:

> "While the rule affects neither venue nor jurisdiction over the subject matter, it does permit the court

> to acquire personal jurisdiction over a defendant in another district within the state in a case like the present—a power that did not exist prior to the adoption of the rules."

Respondent's counsel concede in brief that without Rule 4(f) personal jurisdiction could not be obtained over the petitioner. However, counsel take the position that prior to Rule 4(f), under the facts disclosed by this record, venue was present in the Northern District of Mississippi but that authority to issue service beyond the district was lacking. At page 18, Respondent's Brief, the following language is used:

> "But this choice was more fanciful than real. In practice the choice could be exercised and the plaintiff could sue in the district of his residence only if the corporation was doing business there and had an agent there upon whom process could be served. This was not because of any want of proper venue, but by reason of inability to acquire jurisdiction over the person of the defendant, because process could not run beyond the boundaries of the district, and because process could not lawfully be served upon an agent of the corporation who might be found within the district unless the corporation was actually doing business there."

We have called the attention of the Court in our original brief, beginning page 46, to the prevailing rule that process may not issue from one district to another in the same state without express authority of Congress, and we call the attention of the Court to the language used in the case of *United States* v. *Alaska Packers Assn.*, (C. C. A. D. C.) 30 Fed. 2d 564, showing the comparatively few occasions where such permission has been authorized. The latter case also calls attention to the fact that in no case brought to the attention of the Court had such permission been granted in litigation between private persons where a pri-

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vate person would have an opportunity to sue the defendant in the district of its domicile, or where it was carrying on business, if a foreign corporation.

Mr. Justice Frankfurter, in dissenting opinion, *Freeman* v. *Bee Machine Co.*, 319 U. S. 448, 87 L. Ed. 1509, calls attention to various Acts of Congress providing for the issuance of process from one district to another. It will be noted, however, that in every instance where Congress has provided territorial jurisdiction in a district other than that in which the defendant might be found, in the same sentence it has provided for the issuance of process to the appropriate district. This statement alone should be conclusive against the construction sought to be imposed upon Sections 51 and 52 by respondent's counsel, and demonstrate the incorrectness of the decision of the United States Circuit Court of Appeals in this case.

Since Mississippi has two federal districts, territorial jurisdiction over petitioner is fixed in Section 52, 113 U. S. C. A., Title 28. However, the requirement that the nonresident defendant must be found within the district necessarily applies.

Doscher v. *United States Pipe Line Co.*, 185 Fed. 959; *John D. Park & Sons Co.* v. *Bruen*, 133 Fed. 806; *New Jersey Steel & I. Co.* v. *Chormann*, 105 Fed. 532; *Goddard* v. *Mailler*, 80 Fed. 422; *East Tennessee, V. & G. R. Co.* v. *Atlanta & F. R. Co.*, 15 L. R. A. 109, 49 Fed. 608.

Respondent is forced to take the position that the proper venue for this case would at all times have been, under the facts here disclosed, in the Northern District of Mississippi, and the United States District Court for the Northern District of Mississippi would at all times, under the facts here disclosed, have had territorial jurisdiction, but that Congress, for the first time in its history over a period of 150 years, in fixing territorial jurisdiction or venue in a district

other than that in which the defendant could be found, in a moment of absentmindedness, neglected to provide for the issuance of process. We submit that by the failure of Congress to provide for the issuance of process it conclusively appears that it was the intention of Congress that the nonresident defendant, whether individual or corporation, be present within the territorial limits of the district before territorial jurisdiction could be obtained over him. Any other construction is to attribute to Congress a neglect to provide for the issuance of process in such cases and is at variance with its uniform action in such cases. Furthermore, it may be noted that, never in its history, has Congress fixed venue in a district unless defendant was present therein, or the cause of action accrued in such district. In other words, Rule 4(f) of Civil Procedure, as construed in this case, is out of harmony with the entire Congressional history on the subject matter.

(c) *Expressio unius est exclusio alterius.*

Turning to Section 51, 112 U. S. C. A., in certain instances Congress has fixed venue and territorial jurisdiction in the district and provided for the issuance of process to the other districts and even to other states in order to bring a defendant before the Court. In paragraph (b), Congress has fixed venue or territorial jurisdiction in any action brought on behalf of the United States in any district where the defendant is an inhabitant, or where there be more than one defendant in any district where any one of the defendants is an inhabitant, or in any district where the cause of action or any part thereof arose. The paragraph contains appropriate provision for process issuing to other districts or even to other states.

In Section 51, Section 112, U. S. C. A., as amended, Congress has provided venue in a suit by a stockholder on be-

half of a corporation, providing that suit might be brought in the district in which suit against the stockholders might be brought, with provision for process to other districts.

Section 52, being Section 113, U. S. C. A., provides that where there are two or more districts in the state, the venue is fixed in the district where one of them may be found, with process to another district.

Sections 113 to 117, Title 28, U. S. C. A., contain similar provisions where venue is fixed in one district, with provision for process to another district to bring in a defendant not found within the district.

The rule, *expressio unius est exclusio alterius*, is applicable. Congress has provided the circumstances under which territorial jurisdiction is fixed as to a defendant not within the district, whether corporate or individual, and an addition may not be made thereto by Rule 4(f). The effort in this case is to add something to Sections 51 and 52 to the effect that if the plaintiff be a resident of the district and the defendant be a nonresident, that process may issue to any district in the state where the nonresident defendant may be found. By its failure to make such provision, it conclusively appears that Congress had no such intention. The statute may not be added to or diminished by Civil Rules of Procedure, or judicial construction.

In *Camp* v. *Gress*, 250 U. S. 308, 63 L. Ed. 997, addressing itself to this question, the Court used the following language:

> "On the other hand, Section 52 of the Judicial Code makes it clear that the construction contended for by the defendant is unsound. It provides that where a state contains more than one district a suit (not of a local nature) against a single defendant must be brought in the district where he resides; 'but if there are two or more defendants, residing in different districts of the state, it may be brought in either district.' We thus have an express declaration by Congress that,

under one particular set of circumstances, a codefendant may be sued in a district in which he does not reside. Expressio unius est exclusio alterius. * * * Congress re-enacted in the Judicial Code this provision expressly permitting, in states having more than one district, *all defendants resident within the state* to be sued in any district thereof in which one of them resides; while it made no similar provision for the case where the several defendants reside in different states. If Congress, in re-enacting the provisions of Section 51, had intended that it should establish a rule with reference to defendants resident in different states, contrary to the construction placed by the overwhelming weight of authority upon the identical provision contained in the earlier statute, it would have expressed that intention in unmistakable language."

In *Goldey* v. *The Morning News*, 156 U. S. 518, 39 L. Ed. 517, the following language is used, page 518:

"It is an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government. D'Arcy v. Ketchum, 52 U. S. 11 How. 165 (13:648); Knowles v. Logansport Gaslight & Coke Co., 86 U. S. 19 Wall. 58 (22:70); Hall v. Lanning, 91 U. S. 160 (23:271); Pennoyer v. Neff, 95 U. S. 714 (24:565); York v. Texas, 137 U. S. 15 (34:604); Wilson v. Seligman, 144 U. S. 41 (36:338)."

The purpose of the Judicial Act was to restrict and not enlarge the jurisdiction of the District Courts of the United States.

Rule 4(f) was construed and enforced by the United States Circuit Court of Appeals in this case as to obtain personal jurisdiction over the petitioner, which it could not have had or asserted without such rule. Therefore, it necessarily appears that the jurisdiction of the Court over the person of the petitioner was enlarged by the construction given to Rule 4(f) in this case, which was erroneous.

Point II

No jurisdiction over the person of the petitioner could be obtained through service on its process agent in the Southern District of Mississippi pursuant to Rule 4(f) of Civil Procedure, since such construction would extend the territorial jurisdiction of the District Court of the United States for the Northern District of Mississippi in violation of Rule 82.

We have called the attention of the court, in the preceding subdivision, to the fact that no Act of Congress has given the district courts general power to send their process beyond the boundaries of their respective districts. In fact, the original general Process Act confines the running of writs within the territorial limits assigned to each district. *Toland* v. *Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 69 L. Ed. 1119.

We have called the Court's attention to the fact, in limited specific instances, as to Sections 112 and 113, Title 28, U. S. C. A., where venue is fixed within the district, process is authorized to be issued to other districts. We have directed the attention of the Court to the fact that, in a limited number of other instances, Congress has, specifically, fixed venue in one district and authorized process to issue in another district. It is significant, however, that, in no instance, has Congress fixed venue in any district other

than that in which the non-resident defendant might be found, or where the act complained of was committed.

Any such construction of Rule 4 (f), as was held in the Court of Appeals in this case would be in direct conflict with the history of the judiciary act, and amendments thereof, upon this subject. It was decided in this case, and it is now presented to this court, that Rule 4 (f) authorizes general blanket authority for the issuance of process beyond the territorial limits of the district for a defendant or non-resident. Such a construction would have the effect of extending the jurisdiction of the United States District Court of the Northern District of Mississippi over a non-resident defendant beyond the limits of the district.

Since writing our original brief in this case we have examined the Congressional Record showing the action in the House of Representatives and the Senate on the Rules of Civil Procedure. Congress was not required to take any affirmative action, and did not do so.

We attach as *Appendix I* hereto the report of the Judiciary Committee in the House of Representatives on the Rules. We direct the attention of the Court to the report of the Advisory Committee attached to and forming a part of the report of the Judiciary Committee thereupon. We are inserting that part dealing with Rule 4 (f) from which it would appear that the Advisory Committee on Rules for Civil Procedure, in dealing with Rule 4 (f), called attention to acts of Congress expressly fixing territorial jurisdiction, and providing for the issuance of process to another district. We think this information has some interpretative value, in that it was intended to point out that Congress had never, in any instance, provided territorial jurisdiction in a district where the defendant was not present and could not be found but that it, in the same sentence, provided for process to the proper district, and was indicative of an intent on the part of the Committee that Rule 4 (f)

personam has been limited to the district of which defendant is an inhabitant, or in which he can be found." *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 627, 69 L. Ed. 1119.

Question of Waiver of Venue by Appointing Agent for Service of Process

Respondent's counsel present to the Court the view that since petitioner has appointed an agent for service of process it has consented to be sued in any court, state or federal, wherever situated in the State of Mississippi. The *Neirbo* case is cited as authority for that position. In that case suit was filed by a nonresident of the state of New York, in the southern district, against a foreign corporation engaged in business in the district, where it had its principal office and place of business. The court did not hold that, by the appointment of an agent for service of process, defendant might sue in any court, state or federal, in the state of New York. Since there was a diversity of citizenship, defendant, for purposes of jurisdiction and venue, was placed in the same status as if it had been a domestic corporation. The right of venue, which it waived, was that of being sued in the state of its creation. The court did not hold that a resident of the state of New York, residing in the Eastern District, would have had the same right to sue Bethlehem unless it was present within the district. This suit is based upon the assertion of right to sue petitioner and obtain service of process upon it in the Southern District, because it has appointed an agent for service of process. Process agents, under state statutes, are limited in their authority to receive process by the state statute providing for such appointment. For many years there has been in force, in the state of Mississippi, a statute requiring foreign insurance companies to appoint the In-

surance Commissioner of the state as agent for service of process. The statute was under review by this Court in the case of *Morris & Co.* v. *Skandanavia Insurance Co.*, 279 U. S. 405, 73 L. Ed. 762. In that case appellants filed suit against a foreign fire insurance company, which had appointed the Insurance Commissioner of Mississippi as its agent for service of process, on a claim accruing beyond the limits of the state. This Court held that the agent for service of process was without authority to serve such process, using the following language:

> "The policy sued on was issued, and the loss occurred, in South America. The importation of such controversies would not serve any interest of Mississippi. The purpose of state statutes requiring the appointment by foreign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in controversies growing out of transactions within the state. Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 18, 21, 51 L. Ed. 345, 349, 350, 27 Sup. Ct. Rep. 236; Simon v. Southern R. Co., 236 U. S. 115, 130, 59 L. Ed. 492, 500, 35 Sup. Ct. Rep. 255; Robert Mitchell Furniture Co. v. Selden Breck Constr. Co., 257 U. S. 213, 215, 66 L. Ed. 201, 203, 42 Sup. Ct. Rep. 84; Louisville & N. R. Co. v. Chatters, 279 U. S. 320, Ante, 711, 49 Sup. Ct. Rep. 329. The language of the appointment and of the statute under which it was made plainly implies that the scope of the agency is intended to be so limited. By the terms of both, the authority continues only so long as any liability of the company remains outstanding in Mississippi. No decision of the state supreme court supports the construction for which petitioner contends. And, in the absence of language compelling it, such a statute ought not to be construed to impose upon the courts of the state the duty, or to give them power, to take cases arising out of transactions so foreign to its interests. The service of the summons cannot be sustained."

would only apply in cases where Congress had expressly fixed territorial jurisdiction in a district where the defendant was not present and could not be found. Therefore, in the future, where Congress fixes territorial jurisdiction in such a district, it would be unnecessary to provide for the issuance of process. Rule 4 (f) would apply.

We also attach as *Appendix II* to this brief the proceedings in the United States Senate, from which it would appear that the Judiciary Committee of the Senate merely stated that Rule 4 (f) violated Section 112, Title 28, U. S. C. A., 51 Judicial Code. Doubtless, however, Congress was content to take no action thereupon, since Rule 82 became effective at the same time, providing that neither jurisdiction nor venue should be enlarged or diminished by any rule. The rules were intended to provide for process and procedure.

There is nothing in *Moore's Federal Practice*, Vol. I, Page 361, or *Hughes' Federal Practice*, Vol. 17, page 200, or in statements of Members of Advisory Committee, cited in brief of opposing counsel, contrary to the foregoing.

Respondent's counsel, in brief at page 34, quotes Dean Clark, Reporter for the Advisory Committee, and uses the following language:

> "The question has been raised whether this is not a substantive change, one affecting jurisdiction and venue. I might say on that, it is our theory that definitely it is not. This is not a matter of either the jurisdiction of the court, what matters the court shall hear and decide, or of the venue, which is the place where certain kinds of action shall be tried. This affects neither one of those points. It simply says that in cases where the district court already has jurisdiction and venue its process may reach as far as the confines of that state itself. In other words, that is why we consider it procedural. It is simply allowing people to be brought before the court within the entire state

and not merely within one District." Proceedings from the Cleveland Institute on the Federal Rules (1938) 205-206.

We invite the Court's attention to a very learned article on "Report of the Advisory Committee," written by Gustavus Ohlinger of the Toledo, Ohio, Bar, published in the November number of University of Cincinnati Law Review. We are attaching to this brief as *Appendix III* section 2 of said article. Mr. Ohlinger presents the view that it was the intent of Congress to limit the term "practice and procedure" in the light of the original and historical development of Federal courts.

In this connection we again refer the Court to *Sewchulis* v. *Lehigh Valley Coal Co.*, 2 Cir., 233 Fed. 422, cited on page 37 of our original brief, where the following language is used:

> "But there is a wide difference between the method of serving a summons and the effect of such service when made. The first relates to the 'form, manner, and order of conducting and carrying on suits.' The effect of the formal act called 'service' is not a question of practice at all, but one of jurisdiction and jurisdiction in turn must be tested by substantive law. The portion of the Revised Statutes under consideration is the successor of the Act of Congress of May 19, 1828, c. 68, Sec. 1, 4 Stat. 278, which declared that 'the forms of mesne process * * * and the forms and modes of proceedings in suits in (certain) courts of the United States * * * shall be the same * * * as are now used in the highest court of original and general jurisdiction of the 7 states in which the federal courts are situated."

It was necessary that the district court have territorial jurisdiction of the petitioner. That it could not obtain because petitioner was not present and could not be found within the district. "Jurisdiction of a district court in

Subsequently, the same question was presented to the Supreme Court of Mississippi in the case of *Morris & Co. v. Skandinavia Ins. Co.*, 137 So. 110, 161 Miss. 411. That Court concurred in the conclusion reached by this Court, using the following language:

> "Demurrers filed by the appellee to the bill and crossbill were sustained and both were dismissed.
>
> "It appears from the case of Morris & Co. v. Skandinavia Ins. Co., 279 U. S. 405, 49 S. Ct. 360, 73 L. Ed. 762, that the action at law of Morris & Company against the appellee, which was removed to the federal court, finally reached the Supreme Court of the United States, where the judgments of the courts below, quashing the process and dismissing the action were affirmed, on the ground that the statute requiring a foreign insurance company to appoint the insurance commissioner as its agent, upon whom process may be served, does not subject such insurance companies to the jurisdiction of the state courts in controversies growing out of transactions wholly without the state. This interpretation of the statute, and the reason given therefor, meets with our approval, from which it follows that the original bill filed by the state herein is without merit."

From these cases it necessarily appears that the statutes relating to appointment of process agents for service primarily refer to suits filed in the state court and are for the benefit and convenience of citizens of the state. The authority of the process agent in this case to receive process and to bind the petitioner thereby, so as to permit a federal court to take personal jurisdiction of the petitioner, must be measured by the state statute, from which it necesarily appears that decisions of the supreme court of the State of Mississippi are controlling. A statute providing for a process agent is necessarily limited by the state statute of venue. We have directed Your Honors' attention to Section 1433, Mississippi Code of 1942, made Appendix

"D" to original brief, at page 81. We respectfully submit that an agent for service of process, appointed by the petitioner under Mississsippi's statute, would have no authority to accept service or bind petitioner by service upon him, except and unless suit was filed in the county provided under state statute, or, if filed in federal court, in a district embracing the county wherein venue is fixed under state statute. This rule necessarily followed in the Supreme Court of Mississippi, *Forman* v. *Mississippi Publishing Corporation,* 195 Miss. 90, 14 So. 2d 344. In that case suit was filed against petitioner in a county in the Northern District of Mississippi, process issued and served upon petitioner's agent for service of process in Hinds County, Mississippi, where it transacted business and where the cause of action accrued. The Court held that the cause of action accrued in Hinds County, Mississippi, and, since the petitioner had its principal place of business there, suit could be maintained in no other place, which, necessarily, limited the authority of its agent for service of process to receive or be served with process issuing from court provided by state statute.

It is out of this limitation upon the authority of process agent to receive process that there has arisen the rule to which we directed the attention of the Court under Point IV at page 66 of our original brief.

It is very true that the federal jurisdiction, or venue, cannot be controlled by a state statute; however, neither has the federal court any right to extend the authority of the process agent to receive process beyond that necessarily conferred by state statute. The Supreme Court of Mississippi has never held that a process agent had authority to accept service of process except in a suit returnable according to Mississippi venue statutes. Three cases are *Forman* v. *Mississippi Publishing Corporation*, 195 Miss. 90, 14 So. 2d 344, *Sandford* v. *Dixie Const. Co.*, 157 Miss.

626, 128 So. 887, *Tri-State Transit Co.* v. *Mondy*, 194 Miss. 714, 12 So. 2d 920, in which the Supreme Court of Mississippi held that suit against a foreign or domestic corporation could only be filed in the county where cause of action accrued, or in the county where the domestic corporation was domiciled, or the foreign corporation had its principal office and place of business. Domestic and foreign corporations are placed in the same status under venue statute of the State of Mississippi.

In the case of *American Surety Co.* v. *City of Holly Springs*, 77 Miss. 428, the Supreme Court of Mississippi limited the authority of the process agent to be served with process issued by a Court having jurisdiction. Suit having been filed, however, in the proper county, process may issue to any county for service on the process agent. Residence of the agent for service of process has no relevancy in this case to the venue. Opposing counsel have failed to distinguish the place where suit may be filed from where service may be had upon a process agent. We distinguished the case of *Sandford* v. *Dixie Const. Co.* and *Tri-State Transit Co.* v. *Mondy*, cited by respondent, at page 32 of our original brief.

In the case of *Cohen* v. *American Window Glass Co.*, 2 Cir., 126 Fed. (2d) 111, the Court uses the following language at page 113:

> "This trend toward allowing state law to govern jurisdiction and venue over foreign corporations reached its furthest step in Neirbo Co. v. Bethlehem Shipbuilding Corp. 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437, where a designation of agent under state law was a waiver of federal venue."

Counsel cite *Iser* v. *Brockway* (D. C. Penn.), 25 Fed. Supp. 221. In that case it was held that any suit brought against a nonresident motorist for injury to another, where

it was provided that service might be had on the Secretary of State, should be brought in the United States District Court embracing the county where the cause of action accrued.

Counsel cite *Williams* v. *James* (D. C. La.), 34 Fed. Supp. 61. We distinguished that case in our original brief, page 61. It is significant, however, in this connection, that the court held that the defendants had contracted, under the Louisiana statute, that they might be sued in the state court in the parish where cause of action accrued and that the district court in the instant case embraced such parish. The Court used the following language:

> "The state legislation and the consent of the defendant motorist have brought about a state of facts authorizing this United States court to take cognizance of the case and of his person. Ex Parte Schollenberger, 96 U. S. 369, 377, 24 L. Ed. 853; the Neirbo case, supra; Oklahoma Packing Co. et al. v. Oklahoma Gas & Electric Co., et al., 10 Cir., 100 F. 2d 770.
>
> "Similarly, as in this Oklahoma case, the situs of the accident in the instant case is in a parish (county) within the federal district and the state law of Louisiana provides for suit in the district court of the parish wherein the accident occurred. Louisiana Code of Practice, Art. 165, Sec. 9."

Counsel cite the case of *Mass. Bonding & Ins. Co.* v. *Concrete Steel Bridge Co.*, 4 Cir., 37 Fed. 2d 695. This case was distinguished in our original brief, page 60. In this connection it might be noted, that suit was filed in the district court embracing the county where cause of action accrued, and where, under the state statute, the agent for service of process had authority to receive service.

The case of *Coastal Club* v. *Shell Oil Co.*, 45 Fed. Supp. 859, was distinguished in our original brief, page 61.

The last three cases turned upon the question as to whether or not venue, having been properly laid, service of

process might be had when made upon an agent for service of process in another district.

In the case of *Barnes* v. *Wilson* (D. C. Wis.), 40 Fed. Supp. 689, cited by respondent, the plaintiff was a resident of California, an individual. Edna L. Wilson was a resident of the Western District of Wisconsin and the Mutual Life Insurance Company, one of the defendants, had its principal office and place of business in the Eastern District of Wisconsin. The suit was filed in the Eastern District of Wisconsin and the Court held, very properly, that the plaintiff had the right, since there were two districts in the state, to file suit in the district of either defendant, and that the residence of the agent for service of process was of no importance, using the following language:

> "It is quite certain that this section does not purport to limit the venue of any action which might be brought to the particular locality in which the commissioner happened to reside. The 'consent' to be sued is Statewide. * * * Oklahoma Packing Co. et al. v. Oklahoma Gas & Electric Co., 309 U. S. 4, 6, 7, * * * 84 L. ed. 537 * * *."

It appears in that case suit was filed in the district court of the United States in the district embracing the county where the cause of action accrued and suit was required to be filed under state statute.

Counsel cite *Zwerling* v. *New York & Cuba Mail S. S. Co.* (D. C. N. Y.), 33 Fed. Supp. 721. Suit was filed in the Eastern District of New York. The court held that suit should have been filed in the Southern District where defendant's principal place of business was located, but that defendant had entered general appearance. The case supports petitioner's view.

Counsel cite *Salvatori* v. *Miller Music, Inc.*, 35 Fed. Supp. 845. This case is discussed in petitioner's original brief, page 63.

We have distinguished the case of *O'Leary* v. *Loftin* (D. C. N. Y.), 3 F. R. D., 36, in original brief, page 62.

Counsel cite *Green* v. *C. B. & Q. Ry. Co.*, 205 U. S. 530, 51 L. Ed. 916, cited in petitioner's original brief, page 23. The case is not authority for respondent's position that venue was lacking in the district where suit was brought merely because of inability to procure service upon defendant therein. The court announced the well-established rule that a suit could not be maintained against a foreign corporation except in the district where it transacted business.

We respectfully submit that Petitioner had not consented to be sued in the Northern District of Mississippi and that Court had no territorial jurisdiction of petitioner and suit was properly dismissed.

Substantive Rights of Petitioner

In our original brief, page 52, we presented to the Court the view that the construction given to Rule 4(f) by the United States Circuit Court of Appeals in this case would violate the substantive rights of the petitioner. It is no answer to the argument to say that the rules were submitted to Congress and were adopted. As we have heretofore pointed out, Congress took no affirmative action and it could not delegate its legislative authority. See the case of *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 79 L. Ed. 1570. The question as to whether or not a substantive right of petitioner was invaded presents a judicial question for this Court to determine. *United States* v. *Sherwood*, 312 U. S. 584, 85 L. Ed. 1058; *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479; *Harrison* v. *Schaffner*, 312 U. S. 579, 85 L. Ed. 1055.

We reaffirm the view presented to the Court in our original brief and lay emphasis upon the proposition that the right of petitioner, when sued alone in a transitory

action, to be sued in the district where it is an inhabitant or it may be found, is a substantive right: It should not be required to go two hundred miles to defend in the Northern District an action which arose in the Southern District where it has its only place of business in the state and where its officers, agents and servants reside and where the petitioner's books and records are kept and its corporate functions in Mississippi are exercised in the Southern District of Mississippi.

In 67 C. J., Subject "Venue", Section 155, page 97, the following language is found:

> "The privilege conferred on a defendant of being sued in the county of his domicile is a valuable and substantial right, which is not to be denied upon a strained or doubtful construction of a statutory exception or except in strict compliance with the law on clear and convincing proof, and all doubts are to be resolved in its favor."

In the case of *Shelton* v. *Southern Kraft Corporation*, (S. Car.), 10 S. E. (2d) 341, 129 A. L. R. 1280, 1284, the Court used the following language:

> "There is the prevailing evidence that defendant, a foreign corporation, maintains its only mill and offices for the transaction of the business of the corporation in Georgetown County. The right of a defendant to have a case against him tried in the county in which he resides is a substantial right."

Point III

Respondent was not a citizen or resident of the Northern District of Mississippi.

We presented this question in original brief under Point V, page 68. Respondent's counsel does not controvert the statement of facts therein contained. Petitioner's motion

to dismiss was not heard on oral testimony before the District Judge, but upon certain affidavits submitted by petitioner and a counter-affidavit on behalf of respondent. The question as to whether respondent was a citizen and resident of the Northern District of Mississippi, therefore, is a matter of law appearing upon the face of the record. The burden of proof was upon respondent affirmatively to establish requisite residence, to bring himself within the jurisdiction of the court.

In the case of *Paul V. McNutt, Governor of the State of Indiana* v. *McHenry Chevrolet Co.*, 298 U. S. 190, 80 L. Ed. 1141, 1142, the Court uses the following language:

> "Respondent contends that the burden of proving the lack of jurisdiction rested upon those challenging the jurisdiction. We have considered and overruled the similar contention in our opinion in McNutt *v.* General Motors Acceptance Corp., 298 U. S. 178, ante, 1135, 56 S. Ct. 780, supra. In this aspect we find no substantial difference between the two cases."

In the case of *Carl Wilheim Baumgartner* v. *United States*, 322 U. S. 665, 88 L. Ed. 1525, the Court held that while ordinarily it would accept concurring conclusions of the District Court and the United States Circuit Court of Appeals, that it would, however, have to examine and determine the basic essential fact. The same conclusion was reached by the Court in the case of *Universal Oil Products Co.* v. *Globe Oil & Refining Co.*, 322 U. S. 471, 88 L. Ed. 1399.

In *Crites* v. *Prudential Ins. Co. of America*, 322 U. S. 408, 88 L. Ed. 1356, the Court reversed the decree having the approval of the District Court and the United States Circuit Court of Appeals because the record presented an error of law.

In the case of *District of Columbia* v. *Murphy*, 314 U. S. 441, 86 L. Ed. 329, dealing with the same question, the Court reversed the District Court and the Court of Appeals of the District of Columbia, using the following language:

> "On the other hand, we hold that persons are domiciled here who live here and have no fixed and definite intent to return and make their homes where they were formerly domiciled. A decision that the statute lays a tax only on those with an affirmative intent to remain here the rest of their days would be at odds with the prevailing concept of domicile, and would give the statute scope far narrower than Congress must have intended. Cases falling clearly within such broad rules aside, the question of domicile is a difficult one of fact to be settled only by a realistic and conscientious review of the many relevant (and frequently conflicting) indicia of where a man's home is and according to the established modes of proof. The place where a man lives is properly taken to be his domicile until facts adduced establish the contrary. Ennis *v.* Smith, 14 How. (US) 400, 423, 14 L. Ed. 472, 482; Anderson *v.* Watt, 138 U. S. 694, 706, 34 L. Ed. 1078, 11 S. Ct. 449. The taxing authority is warranted in treating as prima facie taxable any person quartered in the District on tax day whose status it deems doubtful. It is not an unreasonable burden upon the individual, who knows best whence he came, what he left behind, and his own attitudes, to require him to establish domicile elsewhere if he is to escape the tax."

Respondent, in taking advantage of the Mississippi Homestead Exemption Act, which entitled him to exemption from taxation on his homestead in Jackson, Mississippi, made solemn oath that he was a resident of Jackson, Mississippi, in the Southern District of Mississippi. He was not entitled to exemption unless his home was in the City of Jackson. We attach as *Appendix IV* copy of Section 9723, Mississippi 1942 Code, stating the conditions upon

which a taxpayer is entitled to the exemption provided under the Act for his home, and also, as *Appendix V*, Section 9729, Mississippi 1942 Code, making it the duty of applicant to give a true statement of the facts in his sworn application, where the following language is used:

> "(n) All of the information given in the application must be true and correct, and must be supplied by the applicant in the event he does not prepare the application with his own hand. The answer to questions and the information given on the application must not be made or inserted by the assessor or by anyone except as furnished by the applicant himself or herself;
>
> "(o) The application shall be made personally by the applicant, or may be made by his or her agent or attorney duly constituted in writing if a copy of such written authority, duly sworn to and acknowledged or attested by two competent witnesses, be attached to each the original and duplicate application for homestead exemption;
>
> "(p) The application must bear an affidavit by the applicant to the truth of all statements contained therein, and the affirmation may be administered by the tax assessor, a member of the board of supervisors, or any other officer authorized by law to take acknowledgments."

It is conceded that respondent had resided and owned his home in Jackson, Mississippi, for approximately 24 years. During that time he had been several times elected Lieutenant-Governor of Mississippi, which office only required his presence in the City of Jackson three or four months in the year bi-annually. For a period of eight years he held no state office whatever. During all that period, however, he was not only residing in Jackson but was engaged in a gainful occupation. Respondent's answer (R. 31), contains all information with respect to his

intention to return to Calhoun City, Mississippi. The following language is used:

> "The affiant built and furnished, ready for immediate occupancy, a house in the town of Pittsboro in 1939, on a lot in said town, on which he was born, to which he intends to return as his permanent home. Said home consists of three bedrooms, a kitchen, a living room, a bathroom, and it has a screened porch in the front and rear, and has installed in it modern electrical equipment suitable for use as a home and for no other purpose. In 1942 this affiant purchased a cemetery lot in the town of Pittsboro, for the purpose of supplying himself with a place of burial."

We respectfully submit that respondent's counter-affidavit did not even show a floating intention of returning to Calhoun City, Mississippi.

In the case of *Gilbert* v. *David*, 235 U. S. 561, 59 L. Ed. 360, *supra*, the Court used the following language:

> "But, as we have seen, a floating intention of that kind was not enough to prevent the new place, under the circumstances shown, from becoming his domicile. It was his place of abode, which he had no present intention of changing; that is the essence of domicil."

The Supreme Court of Mississippi, in determining what is meant by "resident," used the identical language in the case of *Bank of Cruger* v. *Hodge*, 189 Miss. 356, 198 So. 26.

Counsel cite the cases of *United States* v. *Chemical Foundation*, 272 U. S. 1, 71 L. Ed. 131; *United States* v. *McGowan*, 290 U. S. 592, 78 L. Ed. 522; *Alabama Packing Co.* v. *Ickes*, 302 U. S. 464, 82 L. Ed. 374; *General Talking Picture Corp.* v. *Western Electric Co.*, 304 U. S. 175, 82 L. Ed. 1273, wherein it is held that the Court would not review concurrent findings of the two lower Courts. In each of these cases, however, it appears that the decree appealed from was supported by substantial evidence.

Respondent's counsel cite, dealing with the question of residence, several cases from the Supreme Court of Mississippi. It will not be necessary for us to review the cases since they are all controlled by the more recent cases, *Bank of Cruger* v. *Hodge*, 189 Miss. 356, 198 So. 26; *Ritter* v. *Whitesides*, 179 Miss. 706, 176 So. 728. In our original brief, page 71, reference to each is made.

The United States Circuit Court of Appeals in its opinion stated that petitioner should have taken a cross appeal from the opinion of the District Judge holding that respondent was a resident of the Northern District. It is hornbook law that a successful litigant has no right of appeal as to a judgment in its favor.

We respectfully submit that the decision of the United States Circuit Court of Appeals should be reversed and that of the District Judge affirmed.

Respectfully submitted,

WILLIAM H. WATKINS,
P. H. EAGER, JR.,
RALPH B. AVERY,
MRS. ELIZABETH HULEN,
Jackson, Mississippi,
Attorneys for Petitioner.

E. C. BREWER,
Clarksdale, Mississippi,
Of Counsel.

APPENDIX I

House of Representatives, 75th Congress, 3d Session.
Rept. 2743

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES

Mr. Summers of Texas, from the Committee on the Judiciary, submitted the following report:

"The Committee on the Judiciary, to whom was referred the proposed Rules of Civil Procedure for the District Courts of the United States, adopted by the Supreme Court as authorized by the act of June 19, 1934, chapter 651, and published as House Document 460, Seventy-fifth Congress, third session, have conducted public hearings and have given thorough consideration to the purpose of each of the said rules, and respectfully recommend that same be permitted to take effect as provided in the statute aforementioned.

Conformable to section 2 of the act, the Supreme Court, by order entered June 3, 1935, understood—

"The preparation of a unified system of general rules for cases in equity and actions at law in the district courts of the United States, so as to secure one form of civil action and procedure for both classes of cases, while maintaining inviolate the right of trial by jury in accordance with the seventh amendment of the Constitution of the United States, and without altering substantive rights."

To assist in the undertaking, the Court appointed an advisory committee of distinguished lawyers and law teachers. Several drafts of the proposed rules were formulated and distributed widely among the judges of the various courts, committees of lawyers, bar associations, and individual members of the legal profession, with the object of obtaining the largest possible interest and the greatest number of suggestions for the perfecting of the work, not only as to substance but also as to form and method of expression. Copious notes explaining each of the rules were presented

to the Committee on the Judiciary, and have been published (H. Doc. No. 588, 75th Cong. 3d, Sess.) for the information and use of the bench and bar. These notes reflect the prodicious effort invested in bringing the rules to their final form and text.

In the hearings, published by the Committee on the Judiciary, members of the advisory committee, groups especially concerned with the practical operation of the rules, and witnesses representing different shades of opinion on the subject appeared and were heard; and letters and recommendations from bar-association committees and individual practitioners of the law were presented and read. The committee reached the conclusions herein expressed.

Two questions were raised with reference to which it was determined there should be an expression of the views of the committee as an aid in the interpretation of the rules in question.

The first question was raised orally at the hearing by Judge Joseph Padway, general counsel for the American Federation of Labor, by Merle Vincent, counsel for the International Ladies' Garment Workers Union, Committee for Industrial Organization affiliate; and by a letter filed with the Judiciary Committee by Lee Pressman, general counsel of the Committee for Industrial Organization. They were concerned that the language of rule 4 (d) (3) providing for service of summons upon an unincorporated association "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process," might on account of the relations of central and affiliated labor organizations, be construed as intended to permit service of a summons upon an officer, etc., of an affiliated organization which would be binding upon the central body.

The other question was raised by Messrs. Padway and Vincent orally at the hearing. Rule 65 (e) provides in part as follows:

"These rules do not modify the act of October 15, 1914, chapter 323, sections 1 and 20 (38 Stat. 730) United States Code, title 29, Sections 52 and 53, or the act of March 23,

1932, chapter 90 (47 Stat. 70), United States Code, title 29, chapter 6, relating to temporary restraining orders and preliminary injunction in actions affecting employer and employee."

The apprehension here was that the phrase "relating to temporary restraining orders and preliminary injunctions", might be construed as preserving from change only the provisions of the enumerated acts dealing with temporary restraining orders and preliminary injunctions.

The Committee on the Judiciary suggested that the quoted phraseology in these two rules be considered at a conference between the representatives of the three mentioned labor organizations and of the Supreme Court advisory committee, so that any source of possible difficulty arising from the language used might be avoided. This suggestion was assented to. The conference was held and it was agreed that all doubts as to the meaning of the language used, raised by the representatives of the labor organizations, would be removed by adding to the notes to rule 4 (d) (3) and rule 65 (e) of the notes to the rules of civil procedure prepared under the direction of the advisory committee, the following:

"This enumerates the officers and agents of a corporation or of a partnership or other unincorporates association upon whom service of process may be made, and permits service of process only upon the officers, managing or general agents, or agents authorized by appointment or by law, of the corporation, partnership, or unincorporated association against which the action is brought. (See Christian v. International Ass'n of Machinists, 7 E. (2d) 481 (D. C. Ky., 1925) and Singleton v. Order of Railway Conductors of America, 9 F. Supp. 417 (D. C., Ill., 1935). Compare Operative Plasterers' and Cement Finishers' International Ass'n of the United States and Canada v. Case, 93 F. (2d) 56 (App., D. C., 1937."

To the note to rule 65 (e):

"The words 'relating to temporary restraining orders and preliminary injunctions in actions affecting employer

and employee' are words of description and not of limitation."

The Committee on the Judiciary has considered the additional notes and believe that they state the correct interpretation and construction of the respective rules.

The investigation made by the Committee on the Judiciary is convincing that the Supreme Court and its advisory Committee painstakingly have collected and compared the practice codes and rules in each of the States of the Union, in England and Canada, and, in principle, have selected the best features of present-day court procedure.

The rules not only will be the norm of practice in the Federal district courts, but it is believed will furnish a model to which State practice will tend to conform.

As has been said: "The principle underlying the rules of court is the organic one of an equitable division of power between the legislative and judicial departments of Government. It is the very spirit of the Constitution."

The manner of bringing parties into court and the course of courses thereafter require a well-defined set of rules designed to expedite the administration of justice by the simplication of procedure and the standardization of forms for the ready use of court and counsel. These rules concern only the practice, the method by which the causes shall be presented to court and jury, and the details of practical mechanical operation.

The conferring of power on the Supreme Court by statute to prescribe rules of practice is not a new departure. Statutory authority for the adoption of rules of court began with the Judiciary Act of 1789, and from time to time other acts of Congress have confirmed the rule making power in courts. In the year 1912, the Supreme Court of the United States promulgated a revision of the Federal Equity Rules, which have met with general approval. Those rules now presented to Congress, and although the proposed rules are united, the union is one of procedure only, every legal and equitable right and remedy continues unimpaired.

It is confidently expected that the adoption of the new rules will materially reduce the uncertainty, delay, expense, and the likelihood that cases may be decided on technical

points of procedure which had no relation to the just determination of the controversy on its merits. The waste of judicial time on the questions of practice, the intricacies of Federal jurisdiction, the survival of the obsolete wall between law and equity in procedure and the bewildering effect of the numerous exceptions to the Conformity Act which none but experts can understand made the Federal courts unfavorable forums for the ordinary litigant and the general practitioner.

It should be emphasized that any and all of the rules of procedure are subject to modification or repeal by Congress. Furthermore, it is the opinion of the committee that amendments made by the Supreme Court to the united rules must be submitted to Congress in accordance with the method prescribed for submitting the original rules, i. e., they must be submitted to Congress by the Attorney-General at the beginning of a regular session and will not go into effect until after the close of that session.

Experience in the operation of the new rules should disclose the need for changes from time to time, and only by practical experience can the necessity for changes be determined. A single uniform system of procedure under which the lawyers in every locality may practice with equal facility in the National and State courts is altogether desirable. The proposed rules, which thousands of the bar and hundreds of the bench have helped to frame, undoubtedly are an important step toward an ideal system; and the Committee on the Judiciary expresses appreciation of the splendid services of the Supreme Court of the United States and its advisory committee in a noteworthy achievement, a signal advance along the pathway of justice, and a landmark in the history of American Jurisprudence.

EXCERPTS FROM THE NOTES TO THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES CONCERNING RULES 4 (F) AND 82

Notes prepared under the direction of the Advisory Committee on Rules for Civil Procedure appointed by the Supreme Court of the United States.

Note to Subdivision (f) of Rule 4.

"This rule enlarges to some extent the present rule as to where service may be made. It does not, however, enlarge the jurisdiction of the district courts.

U. S. C., Title 28, Sections 113 (Suits in States containing more than one district) (where there are two or more defendants residing in different districts in same state), 838 (Executions run in all districts of state: U. S. C., Title 47, Section 13 (Action for damages against a railroad or telegraph company whose officer or agent in control of a telegraph line refuses or fails to operate such line in a certain manner—"upon any agent of the company found in such state"); U. S. C., Title 49, section 321 (c) (Requiring designation of a process agent by interstate motor carriers and in case of failure so to do, service may be made upon any agent in the state) and similar statutes, allowing the running of process throughout a state, are substantially continued.

U. S. C., Title 15, Sections 5 (Bringing in additional parties) (Sherman Act), 25 (Restraining violations; procedure); U. S. C., Title 28, Section 44 (Procedure in certain cases under interstate commerce laws; service of processes of court), 117 (Property in different states in same circuit; jurisdiction of receiver), 839 (Executions; run in every State and Territory) and similar statutes, providing for the running of process beyond the territorial limits of a state, are expressly continued."

RULE 82. Jurisdiction and Venue Unaffected.

"These rules grant extensive power of joining claims and counterclaims in one action, but, as this rule states, such grant does not extend federal jurisdiction. The rule is

declaratory of existing practice under the Federal Equity Rules with regard to such provisions as Equity Rule 26 on Joinder of Causes of Action and Equity Rule 30 on Counterclaims. Compare Shulman and Jaegerman, "Some Jurisdictional Limitations on Federal Procedure", 45 Yale L. J. 393 (1936)."

APPPENDIX II

From Volume 83, Part 8, Congressional Record, 75th Congress, 3rd Session, June 8, 1938

"The Senate Committee on the Judiciary to whom was referred the joint resolution (S. J. Res. 281) to postpone the effective date of the Rules of Civil Procedure for the District Courts of the United States, after consideration thereof, report the same favorably with the recommendation that it do pass.

The Rules of Civil Procedure for the District Courts of the United States were presented to the Congress on January 3, 1938 by the Attorney General.

These rules prescribe the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. They purport to unite the rules for cases in equity with those in actions at law and will take effect upon September 1, 1938, or three months subsequent to the adjournment of this session of Congress. The rules are intended to have the force and effect of repealing and superseding numerous acts of Congress now on the statute books, and innumerable questions will arise as to the exact extent of the conflict.

If Congress takes no action on the proposed rules, they will take effect, leaving hundreds of laws, enacted by Congress during the past century, still on the statute books, some of which undoubtedly are in conflict with many of the provisions of the rules. The result obviously will be uncertainty as to whether the rules or the statutes are to prevail. The act under which the rules were drawn does not provide for any action by Congress, but, as indicated, merely declares that the rules shall be submitted to Congress; and, in addition, provides (or is interpreted to provide) that when

adopted all acts of Congress heretofore passed, and possibly to be enacted hereafter, i.e., regulating practice in the Federal Courts, shall no longer be in effect.

It is the opinion of many that this will result in great confusion and instead of simplifying procedure will greatly complicate it. It is possible that in nearly every case the attorneys will be required to ascertain whether or not they have complied with the rules and the applicable statute to see whether there are conflicts or whether there may be conflicts. This means that the attorneys must select one or the other course at their peril, and so in many cases the question will have to be submitted to the court for decision. As an example, the statute that requires that the practice in the Federal courts shall conform to the State practice (the so-called Conformity Act). Would it not be better in order to avoid confusion to repeal the Conformity Act directly and not have it nullified by some promulgation of rules of court which repeal it by implication?

As stated, the rules will soon go into effect. There has been no opportunity by the Judiciary Committee of the Senate to study the rules and their effect upon statutes; and it would seem, in view of the importance of the questions involved, that a thorough study should be made by Congress before the rules become effective. This may not be done during the few weeks remaining of the present session.

The joint resolution recites some of the reasons why the effective date of the proposed rules shall be extended to the adjournment of the first session of the Seventy-sixth Congress. If this extension is given, full opportunity will be afforded for a thorough study and examination of the rules.

For these reasons, briefly stated, the Committee on the Judiciary of the Senate recommend that Senate Joint Resolution 281 do pass.

Herewith is submitted a memorandum briefly presenting reasons in behalf of the adoption of the resolution.

Memorandum

It can readily be seen that if Congress is to complete its work and establish effectively a simplified system of practice in the Federal Courts combining law and equity, it should

make the statutes conform to the rules. This may not be a difficult task. In many cases the statute may be amended by substituting for the special procedure outlined in the statute, a provision that the procedure shall be as provided in the rules of court. This will settle a question that is bound to be the subject of interminable litigation, that is, whether a statute is substantive law or merely procedural. If substantive law, the rules cannot repeal it for there is no authority to change substantive law. This is provided in the statute authorizing the making of rules.

But what is "substantive law" as distinguished from "practice and procedure", which are proper subjects of rules of court? Certain it is that courts may well differ on what is "substantive law" and what is "procedure" in many of the rules. Certain it is that Congress enacted numerous statutes, found in the Judicial Code and its amendments, that were considered by Congress as affecting "substantive rights" and not merely the making of rules of court.

It has been held that many steps in a trial, which have offhand seemed to be merely matters of practice, such as the matter of charging the jury whether orally or in writing, the submission of interrogatories, the submission of a special verdict, the power of a court to set aside a judgment after term, the power of a court to vacate its findings and grant a voluntary nonsuit, are none of them matters of "practice and procedure".

Many of the rules contain provisions as to which there will be interminable dispute on the question whether they affect substantive rights or are merely procedural.

All this suggests the advisability of a careful study of all the statutes that are affected by the new rules. The committee of the bar association which proposed the rules has prepared a pamphlet which contains a comment on each rule and, in most instances, a reference to the statute intended to be nullified or modified or affected in some way. This pamphlet may serve as a guide in revamping the Judicial Code so as to harmonize it with the rules and avoid a vast number of questions concerning construction. This work cannot be completed in the remaining days of the present Congress. The draft of the "comments" to

which reference is made has not yet been printed in final form. The House committee has not yet printed its hearings and has not yet made a report.

It is clear that a much finer work and one more satisfactory to the bar of the country can be performed if the Congress will postpone the effective date of the new rules so as to afford an opportunity to avoid the confusion resulting from conflicts between the rules of court and the acts of Congress. The resolution suggests a date at the end of the next session. The one point it is desired to emphasize is that Congress should have an opportunity to act upon the proposals for the modifications and corrections of the statutes, instead of leaving the statutes providing for one thing and the rules of court another, because of inaction by Congress, and allowing the rules to go into effect within a few weeks.

Some of the Conflicts and Uncertainties Resulting from Adoption of the Rules Without Modifying The Statutes

(1) Rule 26 relating to mode of proof as distinguished from "Practice and Procedure." Conflicting statute 28 U. S. C. Sec. 635 (Judicial Code).

(2) Rule 57 affecting remedies. Conflicting statute 28 U. S. C. sec. 400, Declaratory Judgment Act, and see 256 N. Y. 298.

(3) Rules 38 (a) and 38 (d) affecting right to trial by jury. Conflicting statute 28 U. S. C. sec. 773 Judicial Code. United States Constitution, art. III, sec. 2; 52 U. S. (11 Howard) 669.

(4) Rule 4 (f) enlarging power to issue process. Conflicting statute 28 U. S. C. sec. 112; Toland v. Sprague, 12 Peters (37 U. S.) 300.

(5) Rule 6 (c) and rule 59 (b), powers of courts after term. Conflicting statutes, see Bonson v. Schutten, 104 U. S. 410.

(6) Rule 43 (b) and rules 26, 31, 33, 34, unlimited right of discovery. Conflicting statutes, 28 U. S. C. sec. 636

Judicial Code; Hanks, etc., v. International Co., 194 U. S. 303.

(7) Rule 35, physical examination of persons. Conflict see 113 U. S. 717; Union Pacific Co. v. Botsford, 141 U. S. 250; Rev. Stat. sec. 861, 863, et seq. Rev. stat. sec. 724, 28 U. S. C. 635 et seq., Judicial Code.

Article IX, Sec. 43—Oklahoma Statutes annotated:

"Foreign Corporations—Conditions of doing business—Service—Place of Suit. No corporation, foreign or domestic, shall be permitted to do business in this State without first filing in the office of the Corporation Commission a list of its stockholders, officers, and directors, with the residence and postoffice address of, and the amount of stock held by each. And every foreign corporation shall, before being licensed to do business in the State, designate an agent residing in the State; and service of summons or legal notice may be had on such designated agent and such other agents as now are or may hereafter be provided for by law. Suit may be maintained against a foreign corporation in the county where an agent of such corporation may be found, or in the county of the residence of plaintiff, or in the county where the cause of action may arise."

APPENDIX III

II. What Is the Scope of the Power Which the Act of June 19, 1934 Confers on the Supreme Court?

All this, however, finally leads into the second question, namely, the scope of the power which the Act of June 19, 1934, confers on the Supreme Court. Here the initial recourse must, of course, be to the act itself. It provides that:

"• • • the Supreme Court of the United States shall have the power to prescribe, by general rules for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings,

and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. * * *" It further provides that:

"The court may at any time unite the general rules prescribed by it for cases in equity and those in actions at law so as to secure one form of civil action and procedure for both: Provided, however, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate * * *."

The words "the forms of process, writs, pleadings, and motions" occasion no difficulty. Everyone is familiar with the terms "process," "writs," "pleadings," "motions," and "forms". The regulation of these "forms" and the making of rules "directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description" belong to the courts and do not involve the exercise of legislative functions. The enumeration necessarily includes the time and manner of making returns and of preparing and filing pleadings and other papers. These are all matters of detail in judicial administration.

So far we are on safe ground. Whether, on the other hand, the Supreme Court can go beyond this is the serious question. On familiar canons of statutory construction it can well be argued that it was the intent of Congress to limit the general term "practice and procedure" to particulars of the kind set out in the preceding enumeration, that is, to matters *ejusdem generis* as "forms of process, writs, pleadings and motions" and that the general term cannot be extended to include matters of jurisdiction, power, modes of proof, rules of evidence and substantive law.

The Conformity Act uses some of the same terms, though in a different order, namely,

"The practice, pleadings, and forms and modes of proceeding in civil causes * * * shall conform * * * to the practice, pleadings, and forms and modes of proceeding

existing at the time in like causes in the courts of record of the state * * *."

If anything, the order in which the words are used in the Conformity Act permit of a wider scope for the initial term, "practice", nevertheless, in applying the Conformity Act it has been held that the Declaratory Judgment Law of Kentucky is not a matter of "practice, pleadings, and forms and modes of procedure;" that the manner of charging the jury, whether orally or in writing, the submission of interrogatories, the submission of a special verdict, the calling of a party for cross-examination under a state statute, the manner of perfecting, settling and signing a bill of exceptions, the power of a court to set aside a judgment after term, the power of a court to vacate its findings and orders during term and to grant a voluntary nonsuit—are none of them matters of "practice and procedure."

Finally, the Act, in its second section, provides that the court

"* * * may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both."

The word "unite," as used in the Act, plainly refers to the rules prescribed for actions at law and for suits in equity respectively. The rules may be united—but that does not mean that the distinction between equity and law is to be obliterated, as the report, possibly through inaccurate expression, seems to infer when it says of Rule 2, that it supersedes United States Code, Title 28, Section 384,—the section which has been in the federal statutes since the Judiciary Act of 1789, and provides that "suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law." In fact, this old enactment codified the distinction as it was known and as the Constitution recognized it in 1787, and as it has persisted in the constitutional courts to this day. Neither statute nor rule can obliterate it.

However, the scope of the Act, particularly of the words "practice and procedure," should not be left solely to con-

siderations of statutory construction, for it is true here, as Justice Holmes remarked in deciding whether an estate tax should be classified as a direct tax, or as an indirect tax, that "a page of history is worth a volume of logic." An examination of the origin and historical development of the system of constitutional courts will show that the words practice and procedure have, from the first, had a meaning which is really inherent in the scheme of government by separate legislative, executive and judicial departments provided in the Constitution.

Many of the framers of the Constitution were members of the first Congress and took part in drafting the first judiciary act, the famous Judiciary Act of 1789. For this reason the Supreme Court has frequently referred to the act as "a contemporary interpretation of the constitution of the most forcible nature" and as "a practical exposition too strong and obstinate to be shaken". According to some scholars, the act has been "smothered in praise" and acclaimed as "probably the most important and the most satisfactory act ever passed by Congress." A detailed study of its provisions should, therefore, both from the historical standpoint and from the standpoint of logic, aid in running the line that should separate the functions of the legislative and judicial departments in providing for the administration of justice.

We go, then, to this enactment of the first Congress which remains to this day the foundation structure of our system of constitutional courts within the states.

After providing for the organization of the Supreme Court, of the district courts and of the circuit courts, and for their territorial venue and terms, the act in logical progression provides for

1. The jurisdiction of the courts. Sections 9, 10, 11, 12, 21, 22, and 25 confer upon the Supreme Court, the circuit courts and the district courts, their respective jurisdictions.

2. The power of the courts. Sections 13, 14, 15, 17, 18 and 30 confer that power. Section 13 confers power on the Supreme Court.

"* * * to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and mari-

time jurisdiction, and writs of mandamus, in cases warranted by the principle and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

This is the clause that gave Chief Justice Marshall his opportunity for judicial statesmanship in Marbury v. Madison. Section 14 then confers upon all the courts created by the act the power

"* * * to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

Section 15 then proceeds to confer the power to require parties to produce books and documents on the trial of actions at law; Section 17, the power to grant new trials, to impose oaths and affirmations and to punish for contempt; Section 18, the power to stay executions; Section 30, the power to admit in evidence depositions *de bene esse* under certain circumstances, and to compel witnesses to appear and depose.

3. The mode of proof. Section 30 requires, except where depositions are permitted,

"* * * that the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all courts of the United States * * *"

including, contrary to English practice, chancery and admiralty cases—a provision not relaxed until the Act of April 29, 1802.

4. The substantive law. Section 34 is still our rules of decision act.

And finally and separate from all the others:

5. Practice and procedure. Section 17 empowers the courts

"* * * to make and establish all necessary rules for the orderly conducting business in the said courts, pro-

vided such rules are not repugnant to the laws of the United States."

Immediately following and supplementing the Judiciary Act came the Temporary Process Act of 1789, which provided:

"• • • that until further provision shall be made, and except where by this act, or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process • • • in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same."

Then came the Permanent Process Act of 1792 enacting:

"• • • that the forms of writs, executions and other process, except their style, and the forms and modes of proceedings in suits in those of common law shall be the same as are now used in the said courts respectively in pursuance of the act, entitled 'An act to regulate processes in the courts of the United States,' • • • except so far as may have been provided for by the act to establish the judicial courts of the United States, subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same. • • •"

From the foregoing it is apparent that the terms "forms of process," "writs," "pleadings," "motions" and "practice and procedure," as used in the Act of 1934, have their antecedents in the same or similar terms used in the Judiciary Act of 1789; moreover, that these early legislators carefully distinguished between these terms and "modes of proof" and "rules of decisions."

In the first judiciary act Congress organized the courts and vested them with appropriate jurisdiction and power—on the other hand, it left to the courts "to make and establish all necessary rules for the orderly conducting business in the said courts," and in the subsequent process acts, as to

law actions, after prescribing conformity to existing state practice, left it to the courts to alter and add to such practice, and to make regulations.

The terms used in these early acts are similar to those in the Conformity Act, and as already pointed out, these terms, as used in that act, have never been construed to include matters of jurisdiction or power.

The creation and organization of the courts and their jurisdiction and power are all within the legislative domain. The making of rules for the transaction of business within the jurisdiction and power conferred is for the courts—that is practice and procedure.

This distinction, it is submitted, is inherent in our scheme of constitutional government.

In so far as the report is confined to matters of practice and procedure it represents, in general, a much-needed simplification and reform. Some of the objectionable features of the preliminary draft have been modified. The question, however, remains whether many of the proposed rules do not exceed the scope of the power conferred by the enabling act and either border upon, or enter, the field of legislation. Some of these rules will now be considered.

APPENDIX IV

SECTION 9723, Mississippi Code 1942.

9723. *Home defined.*—The word "home" or "homestead" whenever used in this act, shall mean the dwelling, the essential outbuildings and improvements and the land, actually occupied as the home of a family group, eligible title to which is owned by the head of the family; subject to the limitations and conditions contained in this act. And the meaning of the words is hereby extended to specifically include:

(a) One or more separate, bona fide homes each occupied under eligible ownership rights, by the widow, the widower, or a family group of heirs, each home being property or a portion of property owned by a deceased person whose

estate has not been distributed or divided or vested in some one for life. But in each case the property for which exemption is sought may not be more than the applicant's inherited portion and must be accurately described on the application, and explained.

(b) Not more than two separate, bona fide homes occupied each by a family group, eligible title to which property is owned jointly, by purchase or otherwise, by the heads of the families.

(c) A dwelling and lands owned jointly or severally by a husband and wife, if they are actually and legally living together.

(d) The home owned and maintained by a bona fide minister of the gospel or by a licensed school teacher, actively engaged, whose duties as such require them to be away from the home a considerable time each year, including January first; provided no income is derived therefrom, except direct proceeds of agricultural products produced thereon.

(e) A dwelling, and the eligible land on which it is located, consisting of two entirely separate apartments only, each apartment being a complete independent living unit, provided; (1) if one unit is actually occupied as a home by the or an owner, the exemption shall be proportionate to the assessed value of the whole, but in no event more than one-half of the whole assessed value, or (2) if the property is owned by two persons and if both units are occupied each by one of the owners as a home, and if no revenue is derived from any part of the property except as permitted by paragraphs (f), (g) and (h), hereof, exemption shall be granted on the whole, one-half of the assessed value to each.

(f) The bona fide residence of a family group owned by the head of the family, whereof not more than four rooms are rented to tenants or boarders.

(g) The bona fide residence of a family group owned by the head of the family, used partly as a boarding house or

for the entertainment of paying guests, if the number of boarders or paying guests does not exceed eight.

(h) The bona fide residence of a family group owned by the head of the family, wherein activity of a business nature is carried on, but which is only nominal in volume, requiring no special allotment of space, no disarrangement of any part of the house as the home, or no special equipment.

(i) Land used for agricultural purposes as defined in section 5 (g) (Sec. 9719) of this act, even though ownership of and title to the dwelling and the site on which it is located has been conveyed to a housing authority for the purpose of obtaining the benefits of the Housing Authorities Act (chapter 338, Laws of 1938) (Title 26, ch. 3) and any amendments thereto or related laws; provided the owner was entitled to homestead exemption on the land before and at the time such conveyance was made.

APPENDIX V

Section 9729, Mississippi Code 1942.

9729. *Duty of applicant for homestead exemption—how made.*—Every person who is entitled to and desires the homestead exemption provided for in this act:

(a) Shall make annual written application therefor to the tax assessor on the prescribed form, on or before the first day of June, each year, beginning with the year 1940, and applications not actually on file on or before June 1 of the current year, may not be dated back, may not be accepted by the assessor, and may not be approved by the board of supervisors or by the commission;

(b) Shall make the application in triplicate;

(c) Shall make separate applications, each in triplicate, to the respective assessors, if all or a part of the property claimed for exemption, lies in a municipal separate school district; and,

(d) Shall make separate applications, each in triplicate, to the respective assessors, if the property claimed for exemption lies in two counties;

(e) Shall deliver to each assessor the application marked "original" and the copy marked "duplicate";

(f) Shall retain the copy marked "triplicate" as evidence of the application and that it was filed;

(g) The application shall show the name of the owner of the property and

(h) The name of the applicant, whether the same as the name of the owner or not; and

(i) Shall contain description of the property, which shall clearly locate and identify it and state the acreage contained, as prescribed in section 13 (Sec. 9727) of this act;

(j) Shall state the kind of title or ownership right held;

(k) Shall state number of book and page whereon deed or other conveyance or evidence of ownership is of public record, or attach to both the original and duplicate application a certified copy of the conveyance by which title is claimed or such other evidence of title as may be required by the commission;

(l) If the property was acquired by the owner after July 1, 1938, as evidenced by the date of the acknowledgment of the conveyance, the application shall state in dollar terms the price for which the property was sold and conveyed to the owner, and the amount of the unpaid principal outstanding on January 1, 1940 or on January 1 of the year in which the application is made;

(m) Shall give such other pertinent information as may be required by the commission;

(n) All of the information given in the application must be true and correct, and must be supplied by the applicant in the event he does not prepare the application with his own hand. The answer to questions and the information

given on the application must not be made or inserted by the assessor or by anyone except as furnished by the applicant himself or herself;

(o) The application shall be made personally by the applicant, or may be made by his or her agent or attorney duly constituted in writing if a copy of such written authority, duly sworn to and acknowleged or attested by two competent witnesses, be attached to each the original and duplicate application for homestead exemption;

(p) The application must bear an affidavit by the applicant to the truth of all statements contained therein, and the affirmation may be administered by the tax assessor, a member of the board of supervisors, or any other officer authorized by law to take acknowledgments.